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IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1914

No. [redacted] 17

ALEXANDER R. MAGRUDER AND ISABEL R. MAGRUDER, APPELLANTS,

vs.

SAMUEL A. DRURY AND SAMUEL MADDOX, TRUSTEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANTS.

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SUBJECT INDEX OF BRIEF.

LIST OF CASES REFERRED TO.

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Statement.

This case comes to this Court on an appeal from a decree of the court of appeals of the District of Columbia entered on the fourth day of December, 1911, confirming a decree of the Supreme Court of the District of Columbia, which confirmed the report of the auditor of that court, settling the final account of the trustees of the estate of William A. Richardson, deceased, and ordering the final discharge of the trustees, the appellees.

The appeal was duly taken, allowed, and perfected, and the transcript of the record was filed in this Court

on the 30th day of December, 1911, pursuant to section 233 of the Code of Law for the District of Columbia, which provided that "any final judgment or decree of the court of appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." The Judicial Code, restricting the right of appeal to this Court in cases arising in the District of Columbia, went into effect on the 1st day of January, 1912 (36 Stats., 1087, 1169).

The appellees, Samuel A. Drury and Samuel Maddox, were appointed by the decree of the Supreme Court of the District of Columbia, hereinafter for convenience termed the equity court, entered April 1st, 1899, trustees to perform the trusts created by the will of William A. Richardson, deceased, and were authorized and empowered thereby to receive from the executors named in his will "all the property whereof the said deceased died seized and possessed."

The general purpose of this suit, which was begun in the equity court in December, 1898, by the appellants, Alexander R. and Isabel R. Magruder, then infants, by Alexander F. Magruder, their father as their next friend, was to remove the administration of the estate and the execution of the trusts created by the will to the courts of the District of Columbia from the probate court of Middlesex County, Massachusetts, where the will had been admitted to probate, and incidentally to avoid the payment of taxes assessed against the estate in Middlesex County.

When the decree appealed from was entered, the general purpose of the bill, so far as it related to the distribution of the estate under the provisions of the will, had been in nearly all respects accomplished by the decree of distribution entered by the equity court on July 9, 1909.

That decree, however, reserved for determination the question of the compensation of the trustees for their services, the ascertainment of what, if anything, is due to or from the trustees or the estate, and the statement and approval of their final account (Rec., pp., 33-36).

The matters thus reserved for determination were referred to the auditor of the court, and his report thereon and the exceptions taken thereto, the report having been confirmed by the equity court and the court of appeals, present the questions which the appellants seek to have considered by this court.

The principal questions are:

First: Have the trustees fully accounted for the property, real and personal, which it is their duty to account for under the decree appointing them and under the orders entered in pursuance of that decree, and are they entitled to their final discharge?

Second: Are the trustees entitled to be paid a commission of 5 per cent on the sum of $313,321.34, being the amount as alleged of principal personal estate, and a commission of 10 per cent on the net income of the estate, as a just and reasonable or "appropriate and proper" compensation for their services?

As the proceedings of the trustees are interlocked with the proceedings of the probate court at Cambridge

as well as with those in the equity court it will be necessary first to refer briefly to what is shown by the record to have happened in respect of the conduct of the two suits.

The proceedings in the probate court and in the equity court.

The probate of the will in the probate court at Cambridge, Massachusetts, in October, 1896, the inventory filed and the issue of letters testamentary to George F. Richardson and Samuel A. Drury.

William A. Richardson died October 19, 1896, while occupying his own house in the city of Washington, with his family, which consisted of his only child, Mrs. Isabel Richardson Magruder, and her husband, Alexander F. Magruder, and their two children, his only grandchildren, the appellants, Alexander R. and Isabel R. Magruder. At the time of his death Mr. Richardson was Chief Justice of the Court of Claims.

He left a will executed in August, 1895, in which he described himself as "a citizen and inhabitant of Cambridge, in the county of Middlesex and Commonwealth of Massachusetts, and having property in said county" and nominated his brother, George F. Richardson, of Lowell, and Samuel A. Drury of Washington, executors and trustees.

Mr. Drury in his answer to the amended bill says that the will was in his, Mr. Drury's, possession at the time of Mr. Richardson's death; that Mr. George F. Richardson came on to his brother's funeral; that after the funeral the will was handed to Mr. Richardson who then

stated that "it was his deceased brother's wish that his will should be probated in Massachusetts and his estate there administered," to which Mr. Drury interposed no objection (Rec., p. 15).

On the 28th of October, 1896, the will was admitted to probate in the probate court at Cambridge, Mass., and letters testamentary issued to the executors named therein.

By this will, after making certain bequests, Mr. Richardson devised his property, consisting almost entirely of real and personal property in the District of Columbia, to his executors or whosoever should manage his estate, in trust for the benefit of his daughter during her life and after her death to be divided between his grandchildren, one-half when they respectively attained the age of 23 years and the other half when they respectively attained the age of 26 years (Rec., p. 9).

In February, 1897, an inventory and appraisement were filed in the probate court which showed personal property of the estimated value of $366,739.35, and realty of the estimated value of $39,800 (Rec., pp. 84 and 85).

From that time until April, 1899, there were no other papers filed in the probate court so far as the record shows.

In the latter part of the year 1898, two actions were pending against the executors, brought by the collector of taxes for the City of Cambridge in the Superior Court of Middlesex County, to obtain the payment of taxes assessed on May 1, 1897, and May 1, 1898, upon the personal property belonging to Mr. Richardson's estate.

The amount claimed in each case was about $5,000.

The suits were brought under the provisions of the Public Statutes of Massachusetts, Chap. 11, sec. 20, clause 7, which in part provides that the "personal estate of deceased persons shall be assessed in the place where the deceased last dwelt."

Mr. Maddox was the adviser and Judge Moody was the counsel for the executors, or rather of Mr. Drury, executor, for it appears from the statements of Mr. Maddox, hereinafter referred to, that Mr. Richardson was opposed to resistance of the tax.

On the 15th of November, 1899, the Superior Court of Middlesex County decided against the right of the collector to recover. That decision was affirmed by the Supreme Judicial Court of Massachusetts on the 16th of May, 1900, the court holding that defendants' testator was not an inhabitant of Cambridge and did not dwell there at the time of his death, and that the decision of the probate court sitting at Cambridge in admitting his will to probate and in issuing letters testamentary did not cut off inquiry as to residence when that question was being considered and when decided by another tribunal having jurisdiction of the subject of inquiry.

> Dallinger *vs.* Richardson & Another, Executors, 176 Mass., 77.

This decision put an end to any real apprehension that the estate of Mr. Richardson could be assessed for taxes in Massachusetts, and removed that objection to the continued administration of the estate in Massachusetts, if that had been desired.

THE INSTITUTION OF THIS SUIT IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA TO OBTAIN THE ADMINISTRATION OF THE ESTATE IN THAT COURT, AND THE APPOINTMENT OF TRUSTEES TO PERFORM THE TRUSTS CREATED BY THE WILL OF MR. RICHARDSON AND TO ENJOIN THE EXECUTORS FROM EXPENDING THE MONEY OF THE ESTATE IN THE PAYMENT OF MASSACHUSETTS TAXES.

In April, 1898, Mrs. Isabel Richardson Magruder, the daughter of Mr. Richardson and the wife of Dr. Magruder, died, her only children, the appellants, being then about 15 and 12 years of age respectively.

Dr. Magruder was appointed guardian of his children on the 30th of April, 1898, by order of the probate court of the District of Columbia.

In December, 1898, the two suits against the executors for taxes alleged to be due were still pending.

On the 30th of December of that year, 1898, the original bill of complaint was filed in the equity court in the name of Alexander R. and Isabel R. Magruder, the appellants, by their next friend, their father, Dr. Alexander R. Magruder, against George F. Richardson and Samuel A. Drury as executors and trustees under the Richardson will, and the amended bill was filed on the 5th of March, 1899, by the same complainants against Samuel A. Drury, executor and trustee alone, Mr. George F. Richardson having declined to act as a trustee.

Mr. Richardson not only declined to act as trustee, but, when the bill was filed making him and Mr. Drury defendants and seeking an injunction, he refused to submit to the jurisdiction of the court, and thereupon Mr. Maddox amended the bill and got a temporary restraining

order. Mr. George F. Richardson was opposed to the suit. This is Mr. Maddox's explanation of the filing of the amended bill (Rec., p. 77).

The original and the amended bills were both signed by Mr. Maddox as solicitor for the complainants.

The amended bill, repeating the principal averments of the bill first filed, after reciting Mr. Richardson's official and judicial career and his ownership of property, alleged that at the time of his death, Mr. Richardson was not a citizen of or a permanent resident or inhabitant of the State of Massachusetts; that he had no property there except a few parcels of land; that his domicile was in the District of Columbia where his home was and where nearly all his property was situated; that the probate court in Massachusetts in which the will was probated was without jurisdiction in the matter of his will and had not and could not have any authority or control whatever over his estate, and that no part of the property of the estate was located in said state or protected by its laws, and that the complainants were entitled to have their rights protected by the supreme court of the District of Columbia from the payment of taxes in Massachusetts.

Paragraphs 11, 12, and 13 of the amended bill state with great emphasis the possession of the property by Mr. Drury and that the complainants are entitled to an accounting in the equity court by the executors, as follows:

> 11. And these plaintiffs further aver and show that although the said George F. Richardson qualified as one of the executors of said will, at or about the time of its probate in the said County of Middlesex, yet he did not and has not undertaken to

perform any duty as such executor, beyond attending to the routine proceedings in said court. To the contrary thereof these plaintiffs aver that the entire care, custody and management of said estate have devolved upon the defendant who from the date of said probate has had in his keeping, and now has, all the money, securities and other assets of said estate, except only the household furniture belonging thereto, and has disbursed all moneys paid out and expended in and about the settlement of said estate and for the maintenance and support of these petitioners.

12. And these petitioners further show that under and by virtue of the powers and authority in said will contained, the executors thereof and trustees thereunder will have full and absolute control over said property and estate until the plaintiffs attain the ages of 23 and 26 years, respectively, and that they will receive and disburse large sums of money for the objects and purposes in said will specified. And these plaintiffs are advised that they are entitled to an accounting in this honorable court for all the property and estate passing under said will, from time to time, and as often as may be necessary, and that such an accounting will be a protection to the defendant in the execution of his trust.

13. That said George F. Richardson has declined to act as trustee under said will, by an instrument in writing, addressed to the honorable, the judge of said probate court, a certified copy whereof is herewith filed, marked "Complainant's Exhibit No. 2," which it is prayed may be read at the hearing of this cause and taken and considered a part hereof.

The prayers for relief were in substance as follows:

That the will of Mr. Richardson might be construed and the rights of the complainants ascertained by the court.

That an account should be taken of all the property of the estate received by Mr. Drury as *executor and trustee*.

That Mr. Drury, as executor and trustee, be required to file accounts showing what moneys he had received and the disposition thereof.

That some fit and proper person should be appointed trustee in the place of George F. Richardson, resigned, to execute the will.

That Mr. Drury should be restrained from paying out any money belonging to the estate for taxes to the State of Massachusetts (Rec., p. 9).

A few days after the filing of the amended bill Mr. Drury, the defendant, on the 11th day of March, 1899, filed his answer thereto, in which he declared—

> that under and by virtue of the trusts reposed in the executors and trustees in said will named and nominated they will have full control of all the property of said deceased, both real and personal, until such time as the plaintiffs attain the ages of twenty-three (23) and twenty-six (26), respectively, and that said executors and trustees will during that period receive and disburse large sums of money for the purposes in said will specified. *And answering for himself, this defendant is willing and hereby consents to now account in this honorable court, or in any other court having jurisdiction in that behalf, for all moneys and other property received by him as such executor and trustee, and to hereafter further account from time to time and as often as may be necessary or proper* (Rec., p. 15, 16).

On the 1st of April, 1899, the equity court entered the following decree appointing the trustees, which is set out at length because of its controlling importance and authority:

> This cause coming on for final hearing on the amended bill, the answer of defendant Drury thereto, and the proofs taken in support thereof, and being submitted without argument and duly considered, it is, thereupon, this 1st day of April, A. D. 1899, ordered that the restraining order heretofore passed in this cause be, and it is hereby, continued till the further order of the court:
>
> And it appearing to the court that the late William A. Richardson was last domiciled in the District of Columbia, and that the sole beneficiaries under his last will and testament bearing date the 9th day of August, A. D. 1895, his grandchildren, the infant complainants herein, have always lived, and are now living, in said District, it is, the day and year aforesaid, adjudged, ordered and decreed that Samuel A. Drury and Samuel Maddox, both of said District, be, and they are hereby, appointed trustees to perform the trusts created in and by said will, and authorized and empowered to receive from the executors named in said will all the property whereof the said deceased died seized and possessed, provided, nevertheless, that the said Samuel A. Drury and Samuel Maddox shall first give separate bonds in the penal sum of twenty-five thousand dollars, each, with one or more sureties to be approved by this court, conditioned for the faithful discharge of their duties as such trustees (Rec., pp. 16, 17).

When this decree was entered and their bonds approved, the trustees became entitled to the possession, management and control of all the property belonging to the Richardson estate which was then in the possession of Mr. Drury and to an accounting from Mr. Drury as to all the property that came into his posesssion at the time of Mr. Richardson's death or after, and the complainants became entitled to an accounting from the trustees in respect of their dealings with the same property.

The bill and the amended bill of complaint, a copy of the will of Mr. Richardson and of Mr. Drury's answer and of the decree appointing the trustees, appear in the record, pages 1 to 17, inclusive.

THE DECREE OF THE MASSACHUSETTS PROBATE COURT OF APRIL 11, 1899, OBTAINED BY THE EXECUTORS DIRECTING THE EXECUTORS TO PAY OVER THE TRUST FUNDS TO DRURY AND MADDOX, TRUSTEES, AND RECOGNIZING THE DECREE OF THE EQUITY COURT OF THE DISTRICT OF COLUMBIA.

The jurisdiction of the Supreme Court of the District of Columbia in equity having been successfully invoked, and Mr. Drury and Mr. Maddox having been appointed trustees with authority to possess and manage the estate of Mr. Richardson, Mr. Drury as executor and Mr. George F. Richardson as executor, early in April, 1899, presented to the judge of the probate court at Cambridge, with the consent of the guardian of the minors, their petition insisting that the will should have been probated in the District of Columbia and asking that they, the executors, should be authorized to pay over the property of the estate and

trust fund to the trustees appointed by the supreme court of the District of Columbia and that thereupon they should be discharged from further responsibility. On the 11th day of April, 1899, the probate court, after referring to the petition and to the order appointing the trustees and to the consent given by all the parties in interest and stating that the laws of the District of Columbia secured the due performance of said trust, entered a decree recognizing in a conspicuous way the jurisdiction of the equity court of the District of Columbia and evincing in an authoritative way its intention to transfer the administration of the estate to that court.

This decree is as follows:

> COMMONWEALTH OF MASSACHUSETTS,
>
> *Middlesex, ss:*
>
> At a Probate Court Holden at Cambridge, in and for said County of Middlesex, on the eleventh day of April, in the year of our Lord one thousand eight hundred and ninety-nine.
>
> On the petition of George F. Richardson and Samuel A. Drury, Executors of the last will of William A. Richardson, praying that they, the said George F. Richardson and Samuel A. Drury, Executors as aforesaid, be authorized to pay over all the trust funds held in trust by them, the said George F. Richardson and Samuel A. Drury, Executors as aforesaid, to Samuel Maddox and Samuel A. Drury, both of Washington in the District of Columbia, duly appointed by the Supreme Court of the District of Columbia Trustees under the will of the said William A. Richardson.

It appearing that all living parties who are interested in the said trust created by the will of the said William A. Richardson reside out of the Commonwealth, to wit, in Washington in the District of Columbia, and it further appearing by a decree of the said Supreme Court of the District of Columbia, dated the first day of April, A. D. 1899, a copy whereof is filed with said petition that Samuel Maddox and Samuel A. Drury were duly appointed trustees to perform the trusts created in and by the will of the said William A. Richardson, and it further appearing that the only living cestuis que trust are Alexander R. Magruder and Isabel R. Magruder, minors, and residents of said Washington in the District of Columbia, and that Alexander F. Magruder, of said Washington, guardian of the said minors, by virtue of an appointment made by the said Supreme Court of the District of Columbia, dated the 30th day of April, A. D. 1898, has signified his consent as such guardian to the granting of the petition aforesaid; and it further appearing to the satisfaction of the Court that the laws of the District of Columbia secure the due performance of said trust, and it being deemed just and expedient so to do:

It is hereby decreed that the said George F. Richardson and Samuel A. Drury, Executors as aforesaid, be and hereby are authorized and directed to pay over the said trust funds to the said Samuel Maddox and Samuel A. Drury, Trustees as aforesaid.

CHAS. J. MCINTIRE,
Judge of Probate Court.

(Rec., pp. 87, 88).

As the trust funds and property were already in the possession of Mr. Drury, no further act of transfer appears to have been considered requisite at that time.

It is stated in the opinion of the court of appeals that the executors were ordered to present an account of their administration (Rec., p. 157), but a careful examination of the record fails to disclose such an order.

THE DECREE OF THE MASSACHUSETTS PROBATE COURT ENTERED APRIL 25, 1899, ALLOWING, UPON THE APPLICATION, AND AT THE REQUEST OF THE TRUSTEES, THE FIRST AND FINAL ACCOUNT OF THE EXECUTORS FOR THE PERIOD BEGINNING NOVEMBER 24, 1896, AND ENDING WITH APRIL 24, 1899.

A few days after the entry by the probate court of the decree of April 11, 1899, directing the transfer of the trust funds by the executors to the trustees, and declaring that the probate judge considered that the laws of the District of Columbia secured the due performance of the trust, an account was prepared in Washington, purporting to be the first and final account of the executors, Mr. Drury and Mr. Richardson, up to April 25, 1899.

This account was made up from the books and papers in the possession of Mr. Drury and was verified by him and transmitted to Lowell and verified by Mr. Richardson and then presented to the probate judge and allowed by him on the 25th of April, 1899.

The account appears in the record, pages 88 to 91. On it when presented to the probate court there was the

following written request for its allowance by the guardian and the trustees:

> The undersigned, being all persons interested (Isabel R. Magruder, the daughter of the said William A. Richardson, having died in April, 1898), having examined the foregoing account, request that the same may be allowed without further notice.
>
> ALEXANDER R. MAGRUDER,
> ISABEL R. MAGRUDER,
> By Their Guardian, ALEXANDER F. MAGRUDER,
> SAMUEL MADDOX, *Trustee.*
> SAMUEL A. DRURY, *Trustee.*
>
> (Rec., p. 89).

The executors charged themselves with the sum of $415,458.37, as being the aggregate amount or value of the *personal* property received by them as executors, as shown by Schedule A therewith exhibited.

Credit was claimed by them for the same amount as being the aggregate of all the sums paid out and disposed of by them as executors, as shown by Schedule B therewith exhibited, and the account was thus balanced.

In Schedule B there appeared *eight* items of money, notes, and other personal property, aggregating $301,031.71, *as having "been paid, transferred and delivered to Samuel Maddox and Samuel A. Drury, trustees, appointed by the Supreme Court of the District of Columbia."* (Rec., p. 90).

The trustees gave the following written receipt on the account for the eight items specified in the account as property delivered to them by the executors, although

the property had been in their possession as trustees since the date of their appointment, April 1, 1899:

> We, Samuel Maddox and Samuel A. Drury, trustees under the will of William A. Richardson, by appointment of the Supreme Court of the District of Columbia, hereby acknowledge that as trustees we have received the property set forth in the last eight items of the foregoing account.
>
> SAMUEL MADDOX.
> SAMUEL A. DRURY.
> (Rec., p. 91).

On the day it was presented the account was allowed by the probate judge, and the following decree entered:

> At a Probate Court held at Cambridge, in said County, on the Twenty-fifth Day of April, A. D. 1899.
>
> The foregoing account having been presented for allowance, and verified by the oath of the accountants, and all persons interested having consented thereto in writing, and no objection being made thereto, and the same having been examined and considered by the court:
>
> It is decreed that said account be allowed.
>
> CHAS. J. MCINTIRE,
> *Judge of Probate Court.*
> (Rec., p. 89).

On inspection of this account it will be seen that the difference between the value of the personal property with which the executors charged themselves as having been received by them, viz. $415,458.37, and the value of the property receipted for by the trustees, viz. $301,031.71, the difference being $114,426.66, was not ac-

counted for except by gross items of expenditure, which included $49,705.31 expended on real estate, taxes, "prior mortgages," etc., and $16,731.64 paid for various trust estates held by Judge Richardson, although no real estate was returned or described in the account.

In the account was an item of $18,800 credited to the executors as "expense of administration," and it will hereafter appear that that amount was paid out of the funds of the estate to Mr. Drury and to counsel without action thereon by the equity court.

The allowance of the account was the last proceeding in the probate court relating to the estate.

This account and the receipt of the trustees thereon were afterwards put forward and made use of by the trustees as absolving them from all accountability as trustees except in respect of the property receipted for by them to the executors, and what was subsequently received by them, and except Mr. Drury's subsequent dealings with the real estate as trustee under the will.

The circumstances under which the account was prepared by and for the executors and trustees, and the pecuniary benefits that the trustees derived from its allowance, are shown by the testimony of the trustees themselves, subsequently given before the auditor and hereinafter to be considered.

All the proceedings in the probate court from the filing of the inventory and including the account and its allowance, are contained in the Rec., pp. 83 to 91, inclusive, and for convenience of reference are reprinted in sequence as Exhibit B to this brief.

The acts and doings of the trustees after their appointment and after the entry of the decree of the probate court approving the account of the executors, and the use made by them of that decree.

The trustees did not then or at any time prior to July, 1909, make a report to the equity court of the action of the probate court or of their own action in respect of the allowance of the executors' account, nor as to the property belonging to the estate at the time of Judge Richardson's death, nor as to the disposition thereof by the executors, except as to the property specified in the executors' account and receipted for thereon by the trustees.

The first proceeding taken by them in the cause after their bonds were approved was to obtain an order from the equity court on the 18th of October, 1899, referring the cause to the auditor—

> "to ascertain and report the amount and character of the estate, real and personal, whereof the late William A. Richardson died seized and possessed, and to state the account of the executors and trustees under the will of said deceased" (Rec., p. 17).

The auditor's report under this reference was not filed until the 19th of December, 1900, nearly two years after the appointment of the trustees. In it the auditor made mention of the order of reference and of all its requirements, but for some reason he wholly disregarded the direction of the court to ascertain and report the amount and character of the property, real and personal, whereof Mr. Richardson died seized, and to state the account of the executors and trustees under the will (Rec., pp. 17-22, etc.)

The record does not show what representations, accounts and claims the trustees then made to the auditor, but it shows that the auditor stated the account of the trustees and charged the trustees with the sum of $270,209.04 as the amount of the principal personal estate received by the trustees from the executors, which was less by over $30,000 than the amount the trustees receipted for on the executors' account.

The first item of credit in the account thus stated by the auditor was the sum of $18,800 as having been paid by the trustees to the executors, which was the same amount that appeared in the executors' account as having been paid by the executors for expenses of administration.

To the auditor's report was attached a schedule or statement of the real estate included in the trust, enumerating some forty pieces or parcel of real estate in the city of Washington, the value of which was not stated or estimated (Rec., pp. 17 to 24).

The personal property thus designated and described in the auditor's first report as having been received from the executors amounted to $270,209.04, and the real estate described in the schedule or statement reported by the auditor constituted all the property belonging to the estate for which the trustees have been held accountable by the auditor and the court of appeals.

The trustees in their first account and the auditor in his first report assumed and acted on the assumption, without explanation, that the limit of the liability of the trustees to account, to make reports and returns, was determined by the decree of the probate court, and the

assumption that the rights of the beneficiaries and the rights and duties of the trustees to have a report as to the estate that went into the possession of Mr. Drury as executor and trustee, and to an accounting by him according to the averments of right in the bill of complaint and according to the admissions and assertion of Mr. Drury, did not exist or were not to be recognized.

The auditor's first report was based upon that assumption, and the four reports that followed the first one, all of which were confirmed without objection, and the trustees' sixth account, not yet finally confirmed, were based upon the same assumption of the limited liability of the trustees to account and as to the effect of the decree of the probate court as a bar to any inquiry into the condition or history of the estate prior to the entry of that decree.

The auditor's first report included the account of the trustees in respect of the Eliza C. Magruder trust and a full statement of the origin and character of that trust, and the second, third, fourth, fifth, and sixth reports include the accounts of the trustees in that matter, and the record shows the present predicament of that trust which will be referred to later in this brief.

The effort of the beneficiaries to end the trust, to divide the trust property and to obtain the final settlement of the trustees' accounts.

During the period which was covered by the five accounts and reports referred to, from April 1, 1899, to and including their last account, all of which were ratified and confirmed, the trustees had under the decrees of the equity court exclusive management and control of

the Richardson estate, including the Eliza C. Magruder trust.

In April, 1906, in deference to the wishes expressed in the will of Mr. Richardson, Alexander R. Magruder was appointed co-trustee with Mr. Drury and Mr. Maddox, but he took no part in the management of the estate for reasons that appear in the record.

At that time Alexander was about to be graduated from Harvard College. Mr. Maddox testified that his feelings towards Alexander were not very friendly because he, Mr. Maddox, *insisted* "that Alexander ought to make a deed conveying to his father a life estate in the Frederick farm, Araby." This Alexander refused to do.

Mr. Maddox's explanation of the demand then made by him of his clients, the beneficiaries, for whom he was trustee, that they should convey to their father, Dr. Magruder, a life estate in a valuable piece of property which the trustees had purchased for a country residence for the family with funds of the estate, was that some years before, when Dr. Magruder was ill and likely to die, Judge Richardson persuaded Dr. Magruder to convey to him certain property which he had by inheritance, to hold in trust, to pay the income and rents of the real estate to Dr. Magruder's sister for her life, and on her death to give the property to Dr. Magruder's two children.

Mr. Maddox, being apparently deeply impressed with what he considered the injustice to Dr. Magruder of this trust, whom he describes as having been his intimate personal friend for very many years, suggested to Alexander, he says, that the "least he could do was to give Dr. Magruder a life estate in the property at Araby

which did not cost as much as Dr. Magruder's interest in the property conveyed in trust was worth."

This conduct of Alexander caused Mr. Maddox to declare at a hearing before the auditor that he did not care to have any further friendly relations with a son like that, and to say in reply to a definite question that it was *certainly a fact that he was much more concerned for the interests of Dr. Magruder than he was for the interests of Alexander* (Rec., pp. 81-82).

The manner in which the Eliza C. Magruder trust was created, and its advantageous provisions for Dr. Magruder's sister and all the particulars thereof, were, explained in the auditor's first report (Rec., pp. 19 to 22).

There was not a particle of evidence adduced before the auditor showing that Dr. Magruder was at any time dissatisfied with or complained of the trust or of the conduct of the beneficiaries in relation thereto. It appeared in fact that Dr. Magruder and his family had been allowed to occupy the farm Araby, which cost over $15,000, free of rent in summer and in winter the town house on H Street, valued at $35,000 also free of rent.

Mr. Maddox's interference in the matter of the Eliza C. Magruder trust and the conveyance of Araby, and his aspersion of the conduct of Judge Richardson, made cooperation between the three trustees impossible and the relations between the trustees and their *cestuis que trust* hostile, and the beneficiaries patiently waited for the time to arrive when the trust could be determined under the provisions of the will.

Alexander became entitled to one-fourth part of his grandfather's estate under the terms of the will on

arriving at the age of 23 years and to another one-fourth on arriving at the age of 26 years. He became 23 years of age on the 17th of January, 1906, but made of the trustees no request for the one-fourth part of the estate to which he was then entitled.

As the 17th of January, 1909, approached, Alexander and his sister, Isabel, the latter of whom would become entitled to one-fourth part of the estate in April, 1909, first employed counsel other than Mr. Maddox to advise them as to their rights and interests and to represent them in the suit.

Timely notice was given to the trustees that a division of the estate would be required, and the trustees prepared and presented a schedule or list of a great number of small properties and of a great number of promissory notes, which were reported as constituting all the property of the Richardson estate, including the property belonging to the Eliza C. Magruder trust estate.

Much time and labor were expended during the succeeding six months in the effort to ascertain and decide how the great number of the properties, securities and promissory notes, etc., described in the lists furnished by the trustees and constituting the estate, could be fairly separated into two allotments or apportionments of equal value, the property described in one list to be conveyed at once to Alexander R. Magruder, and the property described in the other list to be conveyed to Isabel R. Magruder, one-half when she should become entitled to one-half of her share in April, 1909, and one-half to be held in trust for her until she should become entitled thereto in April, 1912.

Finally plans for a division which was to be made, and schedules and lists of the properties composing each one of the two allotments that were to be recognized and given effect to were prepared by two persons of admitted competency and disinterestedness, and were completed and accepted by the complainants and acquiesced in by the trustees. Great care was taken to make the estimates and valuations stated in these schedules fair and accurate, and they have never been criticised.

The two descriptive schedules or lists of the two allotments and valuations and of the property to be held jointly, as signed by the appraisers, are printed in the record between pages 32 and 33 and on page 33 and marked Magruder Exhibit D, Allotment *A* and Allotment *B*.

When the allotments and the division to be made had been finally agreed upon and determined, the complainants, on the 16th of June, 1909, presented their petition to the equity court setting forth the valuation and proposed division of the property reported by the trustees to be in their possession, and asked that a decree might be entered and conveyances executed to carry into effect the plan of division agreed upon.

With the petition there was filed a copy of the decree of the probate court allowing the account of the executors and of the account. This was the first presentation of the account to the equity court, and the first official information given to that court of the allowance of the account by the probate court in April, 1899.

The petition also prayed that the case might be retained to have stated and settled the accounts of the trustees and their compensation determined, and what, if anything, is due the estate and what property, if any, remains in the possession of the trustees (Rec., pp. 27-32).

On the 9th of July, 1909, the decree hereinbefore referred to was entered, dividing and distributing all of the estate of Mr. Richardson in its entirety as reported by the trustees, except the sum of $11,187.78, directed to be held by the trustees. Conveyances were directed to be made according to the provisions of the decree, and the cause was retained as prayed to have ascertained and reported the compensation to be allowed to the trustees and to state their final account and what was due from or to the trustees (Rec., pp. 32 to 37, inclusive).

It is to be noticed that by the decree of distribution and the allotments and valuations therein referred to and recognized by the court and adopted by the parties interested, the total value of Judge Richardson's estate, which the beneficiaries received from the trustees under the decree of distribution, was $261,201.71, including the country estate and city residence, which were valued at $50,000, but not including the sum of $11,187.78 remaining in the hands of the trustees.

The value of all the personal property distributed was $142,811.73, and the value of the realty was but $118,-389.98. The total value, retained and distributed, was $272,389.49.

The proceedings before the auditor, the evidence adduced, the facts elicited, and the auditor's conclusions and report.

The inquiry which the auditor was directed to make involved the ascertainment by him of the basis and extent of the trustees' liability to account to the equity court; their compliance or non-compliance with their duty in that respect; the services rendered by them; the compensation justly due them for their services, considering their conduct in the administration of the trust; and their right to be discharged.

The auditor had before him and examined in the course of his inquiry the recorded proceedings, the decrees and orders of the equity court and of the probate court in Massachusetts, the five intermediate accounts of the trustees covering the period from the time of their appointment, April 1, 1899, to January 17, 1909, their sixth and last account, and their later report accompanying it, dated July 7, 1910, and filed as an exhibit with the auditor's report.

In addition to and in explanation of the documents, reports, etc., introduced in evidence, the trustees gave their testimony before the auditor at the nine hearings beginning February 9, 1909, the last one being on February 16, 1910.

At these hearings the testimony of the trustees, the only witnesses examined, was taken and reported, and is contained in the record, pages 51 to 83, inclusive.

In respect of the questions submitted to the auditor and which he determined, all or nearly all of the material facts and actual transactions on which the answers to

the questions depend are not the subjects of denial or dispute.

The present controversy is as to the legal inferences and effect of the undisputed facts.

Facts and Findings as to the trustees' failure to account fully.

The trustees' accounts and testimony before the auditor plainly show what property the trustees considered it their duty to account for and what property they did actually account for, and that the property actually accounted for was no more than the personal property receipted for by them to the executors on the account of the executors allowed by the decree of the Massachusetts probate court on the 25th of April, 1899, hereinbefore referred to, and certain designated realty and personal property subsequently received.

From the same accounts and testimony it appears that the trustees did *not* make any report, return, or account of all the property, real and personal, of which the testator died seized and possessed, or of the disposition of the property of the estate by his executors from the time of the probate of his will to the date of the appointment of the trustees, or of the property that came into their possession at the time of their appointment and until April 25, 1899, and also that Mr. Drury as executor never made any report or rendered any account to the equity court of the property that came into his possession as executor and trustee under the will.

From the same accounts and testimony it also appears that the trustees contended before the auditor that

their liability to account to the equity court was limited and fixed by the decree of the probate court entered on the 25th day of April, 1899, allowing the first and final account of the executors, covering the period from November 24, 1896, to April 25, 1899, including the period of twenty-four days after the date of the appointment of the trustees, and also that they were absolved and exempted by said decree of the probate court from accounting to the equity court for the sum of $18,800, allowed to the executors by the said decree of allowance entered by the probate court April 25, 1899.

The facts disclosed by the testimony of the trustees, relating to the origin of the account, the purpose and circumstances of its construction, the uses made by the trustees of the account and of the decree approving it, and the benefits obtained by the trustees therefrom, are material in connection with this contention and defense and should be stated.

Mr. Drury and Mr. Maddox agree in their testimony as to the time, place, and manner of the preparation of the account after they were appointed trustees and after the probate court directed the delivery of the trust funds by the executors to the trustees, a few days before the decree was entered at Cambridge, on the 25th of April, 1899, and that the allowance of the account was recommended by them.

Mr. Drury testifies that the reason the account was prepared hastily was because of the fact that Mr. Weir, a lawyer who was associated with young Mr. Richardson, who was taking care of part of the tax title suit in Massachusetts, had an appointment at the Arlington on

a Sunday to prepare the papers, and two days after that, he thinks on Tuesday, that report was passed by the Massachusetts court. It was made out between that Sunday afternoon when they held the meeting at the Arlington and the time necessary to get it started to Boston or Lowell to have it passed.

The account was made out from data exclusively in the possession of Mr. Drury and from his books and under his supervision (Rec., p. 59).

Mr. Maddox testified that he had nothing whatever to do with the items, which were prepared by Mr. Weir who came down to Washington to help Mr. Richardson in preparing the executors' final account which was necessary to be completed in a very great hurry, and that they were in a very great hurry to get the personal estate out of the jurisdiction of the Massachusetts court, because on the 1st of May following another tax year would begin, and they were exceedingly anxious, under the advice of Mr. Moody, to close the executors, account in Massachusetts before the 1st of May (Rec. p. 75).

Mr. Drury and Mr. Maddox besides testifying before the auditor made also a lengthy report entitled "report of the trustees and schedule to accompany their sixth and final account before the auditor," which was made Exhibit 3 to the auditor's report.

This report is printed in full in the record, pages 96 to 128 inclusive, and contains a defence of the proceedings of the trustees.

In it reference is made to the telegram received by Mr. Drury on the 21st day of April, that Mr. Weir would meet

him at the Arlington on the 23d of April, and in this report they stated that "Mr. Drury thereupon hastily prepared his account, as executor, summarizing the property on hand estimated at $415,458.37 and showing all moneys paid out on account of the trust."

This report placed the responsibility for the making of the account and for its contents on Mr. Weir, a lawyer of Lowell and an associate of Mr. George F. Richardson (Rec., p. 97).

When examined before the auditor Mr. Maddox, on cross-examination and with reference to his recommendation for the allowance of the executors' account, testified that he had practically no information as to the making up of the account and does not know by whom it was actually made.

When asked upon what representation he as trustee recommended the approval of the account, he answered that it was upon the recommendation of Mr. Weir (Rec., p. 76).

Facts and findings as to failure to account for $18,800.

In respect of the sum of $18,800, for which the appellants claim the trustees have not accounted but for which they are still accountable, the testimony of Mr. Drury disclosed the following facts:

On the 24th day of April, 1899, the trustees being then in possession, actual or constructive, of the securities and moneys of the estate, Mr. Drury, custodian thereof, segregated and took therefrom $13,000 in notes and $5,800 in cash, in the aggregate $18,800. (Rec., p. 60).

Of this sum Mr. Drury kept $14,600 as compensation for his services to the estate as executor up to that time,

and that amount money went into the commission account of Arms & Drury as the earnings of one of the firm.

On the same day, April 24th, the item of $18,800 was charged on his books "as the allowance for fees, etc., in Massachusetts" (Rec., p. 61).

The remainder of the money was used by Mr. Drury in the payment by him by check of that date to Mr. George F. Richardson of $1,000, which Mr. Richardson refused to receive and turned it over to Mr. Weir, and in the payment to Mr. Maddox and Mr. Moody of $1,500 each by his checks dated June 1, 1900.

Other payments for small sums amounting to $200 were made, but to whom Mr. Drury does not remember (Rec., p. 61).

The explanation given of this proceeding by Mr. Drury in his testimony, which was confirmed by the testimony of Mr. Maddox, was that the item of $18,800 was put into the executors' account when the account was made up at the Arlington as "expense of administration" with the "*understanding*" between Mr. Weir and Mr. Maddox and himself that out of that amount the fees connected with the tax suit were to be paid and that the remainder was to be the compensation to Mr. Drury for his services (Rec., p. 60).

The item in the account relating to the "expense of administration" was as follows:

> Expense of administration, including care of property, the payment of debts, the making of final account, the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about

> $50,000 for repairs on real estate, the taking up of prior mortgages, taxes, etc., including also the payments of moneys to Isabel Magruder and to Alexander F. Magruder, the guardian of their minor children, counsel fees incurred in the defense of suits for taxes in Massachusetts and for counsel fees in Washington, etc., $18,800 (Rec., p. 90).

Mr. Drury testified that the data and particulars making up that item were furnished by him, but he says positively that he made himself no suggestion or request whatever as to the *amount* that was to be fixed and allowed in the account as compensation, but that the amount of "the *compensation* as it was thought would be passed by the Massachusetts court was suggested by Mr. Weir" (Rec., p. 59).

Mr. Maddox testified that on Sunday, the 23d of April, Mr. Weir made the summary, giving the items for which allowance of $18,800 was asked, and with that Mr. Drury had nothing to do except that *he was told or given to understand* that out of it he must pay counsel fees in the tax cases and counsel fees in Washington, but not the costs and expenses of the suits, and that after the payment of those fees whatever was left of the $18,800 would be an allowance to the executors for services in connection with the estate (Rec., p. 97).

Mr. Maddox, having admitted his recommendation for the payment of the account, was asked in respect of this item of $18,800 and was unable to say on what basis it was fixed, and when asked how he could recommend the payment without knowing what it was based on said that he trusted Mr. Richardson and thought Mr. Richardson would do what was right up there and knew what

compensation was allowed executors in Massachusetts (Rec., p. 76).

Mr. Drury and Mr. Maddox in their testimony and the auditor in his report make lengthy explanations of the mistake which it is alleged the *trustees* made in their first account (Rec., p. 22), which was allowed by the auditor in claiming and receiving credit for the sum of $18,800 as having been paid by the *trustees* to the *executors* as *commission allowed by the probate court of Massachusetts*, when in fact that item should not have appeared in the trustees' account at all, because it was a sum allowed to the executors and paid out by the executors under the decree of the probate court of April 25, 1899.

Mr. Maddox and Mr. Drury, correcting this mistake, testified that when that account was made and approved in December, 1900, the trustees had *forgotten or overlooked* the fact that they had not received any part of the estate prior to April 24th, "though it had theretofore been in Mr. Drury's keeping as executor" (Rec., p. 98).

Their assertion was that their accounts and accounting should really begin and should be considered as beginning on the 25th day of April, 1899, and not on the date of their appointment or on the date when they qualified as trustees, which Mr. Maddox stated was the 4th of April, 1899 (Rec., p. 75).

The trustees therefore presented with their report a corrected first account, omitting the $18,800 as a matter with which the trustees were not concerned (Rec., pp. 98-99).

The explanations of Mr. Drury and Mr. Maddox leave unchanged the fact testified to by Mr. Drury and

Mr. Maddox that after their appointment as trustees and while they were trustees Mr. Drury, under a decree obtained by them as trustees, paid to *himself* $14,600 of the moneys of the estate as compensation to himself for services as executor and to Mr. Moody $1,500 for his services as counsel, and to Mr. Maddox $1,500 for his services as an attorney in the tax cases, *and made no report thereof to the equity court.*

In respect of the payment by the trustees of the sum of $18,800, appearing in their first account allowed by the auditor, and also in the executors' account allowed by the probate court, and in respect of the executors' account the auditor concluded:

> "I had no authority to open an account of the Auditor confirmed by the Court without the specific direction of the Court; that therefore neither would I reform the Auditor's first account or pass upon the propriety of the allowance to the executors. It seems to me, also, that even if I could or would reopen the Auditor's report, the allowance by the Massachusetts Court could not be reviewed by this Court, which has no jurisdiction of the Executors or their accounts" (Rec., p. 39).

The final account of the trustees as stated by the auditor adhered to this theory.

The decision of the court of appeals on this point is the subject of the first and second specifications in the assignment of errors (Rec., p. 168).

Exceptions were taken to these rulings of the auditor in and by exceptions 12 and 13 (Rec., p. 131), which were overruled by the equity court (Rec., p. 132).

FACTS AND FINDINGS AS TO TRUSTEE'S PERSONAL PROFITS FROM DEALINGS WITH THE TRUST ESTATE.

A further contention made by the complainants before the auditor was that whatever personal gains and profits in money had been realized by one of the trustees, Mr. Drury, from purchases of notes by the trustees with funds of the estate from the partnership of Arms & Drury, ought to be ascertained by the auditor and charged against Mr. Drury, and be taken into account in determining whether any compensation should be paid to the trustees, or at least in determining the amount of compensation.

It appeared from Mr. Drury's testimony that the firm of Arms & Drury was a partnership, of real estate, loan and insurance brokers; and that the trustee, Mr. Drury, was a partner having a half interest in that firm (Rec., p. 65).

At the second hearing before the auditor inquiry was begun as to the purchase of certain notes appearing in the trustees' last, their sixth, account (Rec., p. 54).

Mr. Drury testified that these notes were all bought by the trustees from Arms & Drury, that Arms & Drury got a commission, "but it was not this money that was used directly to make these loans. Arms & Drury made the loans and then as the money accumulated the trustees purchased the notes" (Rec., p. 54). Further, that the commission was one to two per cent; and that, to the best of witness's recollection, no commission was charged on renewals of notes held by the estate, "but that covers a long period" (Rec., p. 55).

Subsequently Mr. Drury was questioned generally

as to the purchase of notes from Arms & Drury, and notice was entered on the record of the contention of the complainants, and that information was desired as to the profits derived by him by the sale of notes by his firm to the trustees, and he was requested to prepare himself to give that information later if he could not do so then (Rec., p. 66).

At that time Mr. Drury said that the profit from the sale of the notes was *nothing*, that the profit from the *purchase* of the notes was something, that it would be very difficult to determine, that his books would show, but it would require an immense amount of work to arrive at it (Rec., p. 66).

No full or complete answer to this inquiry was ever given, nor was it insisted upon before the auditor, inasmuch as the auditor intimated in the course of the hearings that an inquiry as to the profits of Arms & Drury through their dealings with the trust estate was and would be considered immaterial.

It was developed before the auditor, however, that from the death of Judge Richardson to the distribution in 1910, the firm of Arms & Drury was intimately connected with the conduct of the business of the trust estate, indeed that its administration was carried on from the offices of that firm. Arms & Drury collected the rents, and placed the insurance, for both of which functions they charged a commission (Rec., p. 65). As to repairs, Mr. Drury was asked if Arms & Drury ordered them, and said (Rec., p. 66), "I did; it is all the same;" and that the bills were rendered to the firm. The books of the trusteeship were in Arms & Drury's

office and kept by them, being in one continuous account from the death of Judge Richardson (Rec., pp. 96, 98), and the clerks of the firm were the clerks of the estate (Rec., p. 65). All of the commissions allowed to Mr. Drury by the courts went, not to Mr. Drury individually, but to Arms & Drury, and such of the $18,800 passed by the Massachusetts courts for "expense of administration" as was converted by Mr. Drury to his own use, went, not to Mr. Drury individually, but to the partnership of Arms & Drury (Rec., p. 62).

It was developed that the transactions between the trustees and Arms & Drury were innumerable; and that hundreds or thousands of notes were sold by Arms & Drury to the trustees.

In respect of certain lists of notes about which he was questioned Mr. Drury testified that about ninety per cent of them were purchased of Arms & Drury (Rec., p. 62), but later, when inquiry was made as to a list describing notes amounting to over $200,000, he said that those purchased of Arms & Drury did not amount to over sixty-five or seventy per cent of them and that he would correct his first statement (Rec., p. 71). The remaining notes were taken by the trustees as proceeds of sale of realty, and in renewal of secured or foreclosed loans (Rec., pp. 63, 69).

In respect of all the notes bought of or through Arms & Drury, he testified that the profit of Arms & Drury was from 1 to 2 per cent (Rec., pp. 71, 72, and 74).

It was a part of the business of the firm and it was their custom to buy with their own money promissory notes

and securities and to hold them until they could find purchasers. Mr. Drury says:

> "It was the practice of Arms & Drury, and still is their practice, to take any good loan that is offered to them and which they think is a first-class loan, not knowing at the time of the purchase or make the loan where it will be disposed of; we simply make a loan and wait for clients to come in with the money and take it off our hands" (Rec., p. 65).

The proceeds of the notes when sold belonged exclusively to them. The firm's profit, equally divisible between the partners, would be the difference between what they paid for the notes and what they sold the notes for, and that profit would be realized in or out of the proceeds of the sale when received. All of the notes in question were dealt with in this way.

At one time, on redirect examination, Mr. Drury said that the *borrower* paid the profit in each case, and that the *borrower* paid it to Arms & Drury for loaning the money *before* the time of the sale of the notes to the estate, and that no profit was realized by the sale of the notes to the estate (Rec., pp. 74-75).

At another time he said simply "these notes cost Arms & Drury their face, less a certain commission" (Rec., p. 63). They sold these notes to the trustees at face value plus accumulated interest (Rec., p. 64).

Mr. Maddox's interpolation, printed on pages 55-57 of the record, is evidently intended to raise the inference that the notes transferred to the trustees from Arms &

Drury were the product of building loans, and that no loss had come to the estate.

No evidence was adduced to support either of these assertions. As to the character of the loans, Mr. Drury says (Rec., p. 65) "they were not necessarily all builders' loans" (see also Rec., p. 67).

The complainants contended that they were entitled to an accounting as to his purchases from his firm, irrespective of the question of gain or loss to the estate.

It is in the record, however, that the last account of the trustees showed that they had in their possession notes amounting to but $138,642.00 (Rec., p. 91), while their first account showed $248,569.01 of good promissory notes and in addition $26,907.96 considered desperate (Rec., p. 22). This diminution was accompanied by a diminution in value of the entire estate during the same period, as is herein elsewhere referred to.

The auditor finally held that all inquiry into such profits was inadmissible, and this ruling is made the subject of the third, fourth and tenth assignments of error.

FACTS AND FINDINGS AS TO THE ELIZA C. MAGRUDER TRUST, AND ITS RELATION TO THE RICHARDSON ESTATE.

In pursuance of the order of reference entered in the equity court on the 3rd of February, 1910, hereinbefore referred to (Rec., p. 37), directing the auditor "to state the final account of said trustees in respect of what is known as the Eliza C. Magruder trust," the auditor, in schedules G and H attached to his report and referred to therein, stated the account of the trustees down to February 8, 1910 (Rec., pp. 46 and 140-1-2).

The schedules showed the property belonging to the trust, which was supposed to be worth from twenty to thirty thousand dollars, a part of which property was included in the inventory filed in the Massachusetts probate court.

In their first account the trustees included the property belonging to the Magruder trust and the income derived therefrom, and the auditor in his first report, filed December 19, 1900, stated the account of the trustees in respect thereof (Rec., pp. 19 and 25).

In his report the auditor gave a full explanation of the creation of the trust and a copy of the declaration of trust made by William A. Richardson, February 9, 1894, from which it appeared that Eliza C., Magruder, Alexander F. Magruder, with Isabel Richardson Magruder, his wife, and John R. Magruder and his wife, conveyed to Judge Richardson the property therein described, and on the same day, Judge Richardson made a declaration of trust declaring that he held the property in trust to pay the income after deducting taxes, etc., to Eliza C. Magruder during her life, and at her death to convey all the property, real and personal, to the children of Alexander F. Magruder.

The declaration further provided that on the death of the declarant all the trusts, powers, and obligations vested in him by the conveyances and declarations of trust to which the parties in interest gave their written approval, should vest in and be executed by his executors or whoever should settle his estate in the same manner as they vested in him (Rec., pp. 21-22).

The trustees took charge of the Magruder trust and of

the trust property and continued in possession from the time of their appointment, assuming that authority so to do was given them by the decree of April 1, 1899, and accounting therefor from time to time.

When the decree of partial distribution under Mr. Richardson's will was entered the trustees remained trustees of the Eliza C. Magruder trust and in possession of the trust property, declining to surrender the trust.

When the auditor's last report was made and the accounts in respect of that trust were stated by the auditor, no exception was taken thereto, and the trust continued vested in the same trustees and they continued in possession of the trust property.

Afterwards the cause coming on for hearing in the equity court on the exceptions to the auditor's report, that court overruled all the exceptions and confirmed the auditor's report, and decreed that after payments of money made in compliance with the auditor's report "the said Samuel A. Drury and Samuel Maddox be, and they are hereby, discharged of and from their said office of trustees under their said appointment by the court in this cause" (Rec., p. 132).

This decree deprived the two trustees of all authority under the decree of April 1, 1899, and left the trust property belonging to the continuing Magruder trust in the possession of the two trustees, and leaving Alexander R. Magruder still a trustee under the order appointing him a co-trustee entered in the equity court April 18, 1906.

The court of appeals held that although the decree of April 1, 1899, appointing the trustees appointed them

"to perform the trusts created by the will," and mentioned no other trust, the trustees were *also* appointed trustees of the Magruder trust, which was to be considered a separate trust, and that the equity court did not intend to terminate that trust.

The court, therefore, affirmed with costs the decree of the equity court so far as it confirmed the auditor's report of the account of the trustees of the administration of the trusts *created by the will*, but so far as the Eliza C. Magruder trust is concerned remanded the cause with leave and direction to the equity court to amend the decree in so far as it may relate thereto, and to take such final action regarding that trust estate as may be expedient and proper (Rec., p. 165).

This affirmance of course carried with it the affirmance of the auditor's report as to the completion of the trustees' duties and the compensation awarded the trustees on that supposition.

This decision and judgment is the subject of the sixth specification in the assignment of errors (Rec., p. 169).

FACTS AND FINDINGS AS TO THE COMPENSATION FOUND DUE THE TRUSTEES AND AS TO THE RESULTS OF THE TRUSTEESHIP.

The order of reference passed February 3, 1910, directed the auditor to state the final account of the trustees and "report such commission or compensation to the trustees as may be appropriate and proper" (Rec., p. 37).

The auditor reported that he had "no hesitancy in

finding that the trustees are well entitled to the commissions which they claim, five per cent on that part of the principal upon which they have received no commissions and ten per cent on the income" (Rec, p. 46).

In the progress of the cause the trustees had been allowed and paid as compensation a commssion of ten per cent on the net income of the estate and five per cent on the proceeds of the sale of certain real estate, as appeared from their five accounts previously approved.

Their sixth and final account, as presented and referred to the auditor, showed no claim for commissions except on income and on the proceeds of the sales of realty, but at the hearing before the auditor on the 16th of April, 1909, Mr. Maddox submitted to the auditor an account of the personal estate, amounting to $262,599.74 including sales of realty, that had passed through the hands of the trustees on which no commissions had been allowed, but on which he thought commissions should be allowed.

Mr. Maddox testified that it was for the auditor to decide the rate or basis of the allowance, that he thought the commission should be about five per cent, and that it had been a very troublesome estate since it was turned over by the executors to the trustees (Rec., pp. 54-55).

The auditor did not, however, adopt the figures of the trustees, but stated their account in pursuance of his own findings.

He found that the total net income was $152,184.76, and on that sum he allowed a commission of 10 per cent which amounted to $15,218.47.

He found that the balance of the principal personal estate on which no commissions had been paid was $313,321.34, and on that sum he allowed a commission of five per cent which amounted to $15,666.06.

The total commissions allowed were $30,884.50.

Deducting from this sum the payments previously made to the trustees and appearing in their accounts, and after making certain corrections, the auditor found that the amount still due the trustees as compensation for their services was $14,046.42, payable out of the moneys remaining in the hands of the trustees under the decree of distribution and that there remained for each beneficiary $425.46 (Rec., pp. 143-4-5).

Before considering on what these findings were based and the services of the trustees and how their compensation was determined, a brief preliminary statement of what the estate consisted and what its value was when it was committed to the trustees, and what it consisted of when the decree of distribution was entered, and what was then the value of the estate distributed, will be useful.

The *results* of the trustees' administration plainly appear in the record.

The trustees' first account and the auditor's report thereon filed December 19, 1900, show that the trustees received and charged themselves with the sum of $270,209.04, as being the amount of the "principal personal estate received from the executors" and with *40 pieces* or parcels of ground "included in the trust" and designated in the schedule attached to the account, which,

however, gave no information as to the value of the property or the time when it was acquired (Rec., pp. 22-23).

The property disposed of by the decree of distribution of July 9, 1909, as being all the property then belonging to and constituting the estate of Judge Richardson except the sum of $11,187.78 held by the trustees to await the ascertainment of their compensation, was, as is shown by the schedules or allotments referred to in the decree, the following:

Realty, (*26 pieces*), valued at	$118,389.98
Personalty, valued at	142,811.73
Total value of the estate at close of administration	$261,201.71

The value of the *entire* estate, real and personal, (less the cash retained), at the close of the trusteeship was less than the amount of the *personal* estate at the beginning of the trusteeship by about $10,000, leaving out of consideration the value of the real estate. The amount of loss seems the equivalent of 14 pieces of real estate which were turned over to the trustees, but seem to have disappeared before the estate was transferred to the beneficiaries.

The evidence as to the auditor's method of ascertaining the trustees' compensation and his finding that the principal of the personal estate was $313,321.34, upon which a commission of five per cent was to be calculated and allowed as compensation, and his finding that upon the entire net income of the estate a commission of ten per cent was to be allowed.

The method adopted by the auditor of determining what compensation is now due the trustees was to as-

certain and fix the principal of the personal estate and allow a commission of five per cent on that sum, and to ascertain the total net income from the estate and to allow a commission of ten per cent on that sum, and then to support and justify his finding and the percentages made use of by a general description of the importance and extent of the labors, usefulness and ability of the trustees.

In finding that *$313,321.34* was the balance of the principal personal estate on which the trustees are entitled to a commission of five per cent, the auditor made no reference to and did not take into consideration the fact that the entire amount of the personal estate turned over to the beneficiaries in pursuance of the decree of distribution was only $142,811.73.

He arrived at the sum named by taking the amount of the personal estate shown by the trustees' first account to have been received by them from the executors, $270,209.04, and then adding thereto the proceeds of all the sales of realty sold by the trustees, $58,874.99, and then *deducting* therefrom the proceeds of the sales of realty on which the trustees had already been paid commissions, and deducting also sundry other items.

From these additions, subtractions, and corrections there resulted the sum of $313,321.34, on which the commission of five per cent was allowed (Rec., pp. 142-3).

Objections to this arbitrary and apparently unusual way of ascertaining compensation are apparent on the face of the account and were urged at the hearings.

Attention was called to the fact that there was nothing whatever in the evidence to show that all the real estate

sold by the trustees had not been purchased by the trustees with the moneys or the proceeds of notes received by them from the executors, and that the allowance of five per cent on the money and notes received from the executors and *also* on the sales of property purchased with the money and proceeds of the notes received by the executors would be *double commissions.*

To meet this objection, which is noticed by the auditor in his report, the auditor appears to have made a personal examination as to the sales of realty after the hearings were closed. He found that "*in only two instances* have the trustees received or claimed commissions on real estate into which some of the notes were converted." These instances he describes. He does not correct the account, because the schedules had already been prepared, and because the trustees had already waived other items, but he suggests that "if the court sees fit" a deduction of five per cent on the amount of the two notes carried into the transactions relating to purchases and sales "be made in the decree" (Rec., p. 44).

This suggestion was not noticed by the equity court or by the court of oppeals, as those courts in every instance and in every particular approved the finding of the auditor.

The auditor in turn had accepted and approved all the statements of the trustees made in their testimony and in their long review of their services filed as Exhibit 3 to the auditor's report (Rec., pp. 96 to 128).

In respect of allowances which the trustees had claimed and which had been approved, such as the payment to Arms & Drury as commissions for the collection

of rents and the payments to Mr. Maddox in one or more cases for services as counsel, but which the trustees considered it proper to withdraw, the auditor in his report takes occasion to express his approval of the propriety of the original allowances and to express the liberal view he holds as to the rights of trustees to give to themselves and their associates special employment and compensation in the transactions of the business of the estate.

Concerning the purchase of notes from Arms & Drury and the employment and payment of Arms & Drury to collect rents, effect insurance, etc., and the employment of Mr. Maddox as counsel, the auditor stated that he could see no force in the objections made thereto and that "the customs with respect to these transactions are so well known and so well fixed that it might perhaps be well claimed the court may take judicial notice of them" (Rec., p. 41).

The finding of the auditor that the net income from the estate during the time of trusteeship amounted to $152,184.76 was not questioned (Rec., p. 143).

The evidence relating to the selection and designation by the auditor of the percentages and proportions named by him as measures or means of determining the compensation of the trustees, namely five per cent of the principal personal estate and ten per cent of the net income and the applicability of that designation to the facts appearing in the record.

There was and is no statute or rule of court in force in the District of Columbia fixing or regulating the compensation of trustees for services such as those imposed upon these trustees.

No witness testified as to any practice, usage, or custom specifying the percentages named by the auditor or authorizing their use in the manner in which they were employed by the auditor.

There was nothing in the evidence showing why five per cent and ten per cent rather than any greater or less percentage should be used to measure compensation.

The facts of the case required the exercise of the auditor's own judgment and opinions, independently of any fixed rule of calculation, as will be made apparent.

The evidence relating to the services performed by Mr. Drury and Mr. Maddox as trustees and to the consequences, efficiency and value of those services.

The testimony of the trustees and their accounts show that their services in respect of so much of the estate as they admitted their liability to account for, and which continued for ten years and resulted in a large loss to the estate, were in continuation of the services performed by Mr. Drury alone, as active or managing executor and trustee in respect of the entire estate of Judge Richardson during the two years and seven or eight months intervening between the probate of the will and the appointment of the trustees in April, 1899.

At the conclusion of his administration an apparent deficiency also appeared.

In the inventory of the property of the estate verified by Mr. Drury the schedule of personalty showed property valued at $328,124.57 of good assets and $38,-614.78 of bad or doubtful notes.

The schedule of real estate showed property including

a part of the Eliza C. Magruder trust property valued at $39,800.

The total value of the property inventoried was $406,139.45.

The schedule did not contain the lots in Cambridge to which the bill of complaint and the answer of Mr. Drury referred; nor is there anywhere in the record an account of the disposition of those lots (Rec., pp. 84-5).

In the executors' account prepared by Mr. Drury on the 23d or 24th of April, 1909, the executors charged themselves with $415,458.37 as the value of the personalty. No mention is made of any realty.

In the same account the last eight items amounting to $301,031.71 are accounted for as having been paid to the trustees.

The difference between this sum and the sum of $415,458.37, the difference being $114,426.66, was accounted for only by the items of expenditure appearing in the account which was allowed.

The estate had diminished to that extent (Rec., pp. 88-89-90).

The services of the trustees, like those of Mr. Drury as executor, are shown by their statements and accounts to have been of the usual and commonplace kind incident to the investment of money, the purchase and sale of property, the changes of investment and the collection of interest and rent, the payment of taxes and insurance, and the making of repairs, etc., and were all obviously well within the competency of any real estate broker and real estate agent of average ability, skill and experience.

From the time Mr. Drury was made executor and during all the following years of his trusteeship to July, 1909, the business of the estate was transacted as previously by and through the firm of Arms & Drury, brokers. The auditor refers to the firm as the "agents of the trustees."

There were no legal complications or difficulties of any kind of importance. No instruction was ever asked of the equity court except in a single instance, when authority was requested for the purchase by the trustees of an estate in Maryland as a summer home for Dr. Magruder's family.

The only suits of importance in which the estate was involved were the suits concerning taxes in Massachusetts and this suit brought to transfer the administration of the estate to the District of Columbia and which resulted in the appointment of Mr. Drury and Mr. Maddox trustees.

The closeness of the relations of Arms & Drury to the estate and the extent to which the firm relieved the trustees from labors appear from the accounts and from the testimony, which show that the greater part of the investments of the real estate were made through Arms & Drury and that they were actually paid commissions for collecting the rents and received a part of the premiums for insurance.

The commissions for collecting rents which were allowed to Arms & Drury were finally withdrawn by the trustees (Rec., p. 144).

As to the service rendered by Mr. Maddox, his primary duty was as counsel to his clients in the suit brought

by himself, and the record does not show that he actually performed any service whatever as trustee that could not have been performed by Mr. Drury himself as trustee with the aid of his firm who shared with him the compensation he received as trustee, except in the few suits referred to in the record in which he was separately paid for his services.

In respect of their conduct and administration as trustees the auditor in his report finds that—

> "The trustees have given the services of a trained and experienced business man in real estate matters and a trained and experienced member of this bar during all these years in the execution of this trust, services which have been highly creditable to them and beneficial to the estate in every respect."

He therefore made to the trustees the allowances appearing in this report and in the account stated (Rec., p. 45).

The court of appeals approved the auditor's report and the allowances thereby made for compensation holding—

> "that while the allowance was a liberal one, it is not obviously excessive" (Rec., p. 159).

The report of the auditor and also the opinion of the court of appeals contained summaries of accounts, enumerations of notes, lists of transactions, statements made up of an infinite number of small items taken from the report of the trustees and from the books of Arms & Drury, which showed how a great part of the money of the estate was turned into lands and houses which came under

the care of Arms & Drury as house agents and brokers, and how the real and personal property and the exchanges and investments thereof were made tributary to the general business of Arms & Drury.

The assertion made by the trustees that not a single dollar was lost to the estate by reason of any of the notes purchased by them of Arms & Drury is repeated almost literally in the report and in the opinion, but there exists the fact of the gradual diminution of the estate and the further fact that the trustees have not given the complete particulars of any one transaction in the purchase of notes, or stated in any one case what the profit realized by the firm was.

The evidence of the facts and of the existing conditions which render the ascertainment of the compensation of the trustees impossible and the effort to determine it premature.

Attention has already been called to the proofs which demonstrate the neglect and failure of the trustees to account for the property they were required to account for by the decree appointing them, and their neglect and failure to account for the personal profits realized by them from the purchase of notes from Arms & Drury, and their retention of the property belonging to the Eliza C. Magruder trust and the non-performance and completion of that trust, and the evidence need not be again referred to.

The legal consequences of the established facts as constituting a barrier to the discharge of the trustees and to the final determination of their commissions will be considered in the argument.

The evidence of the acts by the trustees in the administration of the trust which bar recovery by them of any compensation for their services.

Attention has been called also to the proceedings and evidence which demonstrate the contrivance of the trustees before their appointment to deny and defeat the jurisdiction of the Massachusetts court, their subsequent invoking of that jurisdiction to secure the allowance of a large sum for their personal use, their refusal to account for the early period of their trusteeship, their refusal to make a full account of Mr. Drury's personal profits, the attempts of Mr. Maddox to destroy a part of the trust, and his hostility toward the beneficiary who insisted upon preserving it intact. These proceedings and evidence are therefore not here again recited.

The legal consequences of the established facts as constituting a bar to the allowance to them of any compensation whatever will be considered in the course of the argument.

Assignment and Specification of Errors.

The appellants assigned the following as errors on their appeal to this court:

I.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia in so far as said decree discharged the appellees as trustees to execute the trusts created by the will without requiring of them an account of their acts as such trustees prior to April 24, 1899, and subsequent to the death of the

testator, the late Judge William A. Richardson, October 19, 1896, and in holding that inquiry into their acts prior to April 24, 1899, is shut off by the settlement, by consent of the accounts of the Executors by order of the Probate Court of Middlesex County, Massachusetts, passed April 25, 1899.

II.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia in so far as said decree finally discharged the appellees as trustees to execute the trusts created by the will without taking into account the fact that they had as trustees and without authority from or report to the Court appointing them, consented on behalf of the trust estate to the passage of a consent order of the Probate Court of Middlesex County, Massachusetts, by which $18,800 was ordered to be paid out in diminution of the trust estate, of which $18,800 the sum of $1,500 was paid to one appellee for his own use as counsel fee and $14,600 was paid to the other appellee for his own use.

III.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia in so far as said decree finally discharged the appellees as trustees to execute the trusts created by the will without taking into account the fact that one of the appellees had made profits out of his dealings in his individual right with the trust estate, and without directing or permitting an inquiry into the extent of or the profit derived by him from

the transactions of the firm, of which he was a member, with the trust estate in the nature of sales of negotiable paper to the trust estate bought at a discount by the said appellee's firm.

IV.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia in so far as said decree allowed to the trustees the maximum commission permitted by custom or practice, five per cent of the principal and ten per cent of the income of the trust property, without taking into consideration the appellees' failures to account, set forth in the assignments of error numbered I, II, and III, and in so far as said decree affirmed the report of the Auditor wherein it is held that the matters complained of are immaterial in fixing the appellee's commissions for their services as trustees.

V.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia in so far as said decree fixed the compensation to be paid to the appellees as trustees by a calculation of a percentage upon $313,321.34, the value of the principal of the personal estate as it came into the hands of the trustees, and disregarded the lesser value of the estate transferred to the appellants and the value thereof when they were discharged.

VI.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia "so far as that decree confirms the Auditor's report of the account of the

trustees of the administration of the trusts created by the will," notwithstanding the fact referred to in the opinion of the Court that an important trust known as the Eliza C. Magruder trust, which was vested in and is being administered by the said trustees under the provisions of the will, has not yet been executed, and notwithstanding the fact shown by the record that the trust estate, consisting of valuable securities and real estate, still remains in the possession of the trustees.

VII.

(Not printed because not intended to be urged.)

VIII.

The Court below erred in its decision and judgment wherein and whereby it gives and seeks to give validity and effect to the said decree so far as it confirms the Auditor's report as to the amount of the money due to the trustees as compensation for their services as trustees and provides that upon the payments being made by them, specified in the Auditor's report, to themselves and others named, they shall be discharged of and from their office as trustees under their appointment by the Court, while at the same time and by the same judgment, in respect of the Eliza C. Magruder trust, the said Drury and the said Maddox and the said Alexander R. Magruder are still and are to remain trustees and are to continue in possession of trust funds and property.

IX.

The Court below erred in determining and providing for the payment of definite sums of money to the trustees, Drury and Maddox, for their compensation out of

the moneys of the estate in their possession before all the trusts in which they have been constituted trustees have been executed and before the rights and duties of their co-trustee, Alexander R. Magruder, in the trust property remaining in the possession of Drury and Maddox have been ascertained and settled, and before the said trustees have made a full and complete accounting as required by the original decree of appointment and the orders made thereunder.

X.

The Court below erred in affirming the decree of the Supreme Court of the District of Columbia holding and deciding that the exceptions taken by the appellants are not sufficient to require the recommitment of the case to the Auditor, and decreeing that said exceptions be severally overruled (Rec., pp. 168-171).

Argument.

The errors specified in the assignment are grouped for argument under the following points:

I. The trustees' failure to account fully in this cause according to the decree appointing them, and the futility of their attempt to diminish their accountability by obtaining the Massachusetts probate decree of April 25, 1899, (Assignment of Errors, I, IX, and X; *infra*, pp. 60-80.)

II. The trustees' failure to account in this cause for the specific fund of $18,800, which they withdrew from the trust funds, and then procured to be allowed to the executors by the Massachusetts probate decree of April 25, 1899. (Assignment of Errors, II and X; *infra*, pp. 80-85.)

III. The trustees' accountability for the profits realized by Mr. Drury from sales of notes to the trust estate. (Assignment of Errors, III and X; *infra*, pp. 85-94.)

IV. The performance of the trust imposed upon the trustees by the decree of their appointment is not completed, because a part thereof, called the "Eliza C. Magruder trust," remains unexecuted and the trust property remains in the possession of the trustees. (Assignment of Errors, VI, VIII, IX, and X; *infra*, pp. 94-95.)

V. The erroneous allowance of compensation to the trustees and the erroneous fixing of the amount thereof. (Assignment of Errors, IV, V, IX, and X; *infra*, pp. 95-10).

POINT I.

The trustees' failure to account fully in this cause according to the decree appointing them, and the futility of their attempt to diminish their accountability by obtaining the Massachusetts probate decree of April 25, 1899.

The most serious phase of the trustees' derelictions, developed upon the reference to the auditor, was the fact that the two trustees, Drury and Maddox, never have accounted fully for the period between April 4, 1899, the date of their qualification and April 25, 1899, and that the testamentary trustee, Drury, has never accounted for the period between the death of Judge Richardson, October 19, 1896, and April 25, 1899.

April 25, 1899, was the date of the consent decree discharging the executors in Massachusetts, and, in form, settling their accounts there.

The effect of their failure to account on their right to compensation will be separately considered under Point V. This portion of the argument is intended to demonstrate that they have failed and should be now compelled fully to account.

The facts material to this contention have been fully set out hereinbefore (supra, pp. 28-36).

It is not denied that after Judge Richardson's death, October 19, 1896, and until April 25, 1899, no account was rendered to any court by those administering the property of which Judge Richardson died seized and possessed.

THE FAILURE TO ACCOUNT IS WITHIN THE SCOPE OF THE REFERENCE.

The auditor considered that the inquiry proposed was beyond the scope of the reference; and that his authority in stating the sixth and "final" account was confined to an accounting of the balances of money and property shown to remain by the previous intermediate accounts, and that neither he nor the equity court could review the allowances to the executors or their account as filed in the Massachusetts Court (Rec., pp. 39, 73).

In respect of *compensation* to be allowed the trustees as upon the completion of their duties, it seems very clear that any failure of the trustees to account fully or any unauthorized or unreported action by them would be material, and obviously all that is here said as to such failure and action of the trustees is what is elsewhere herein claimed to have been erroneously disregarded in fixing compensation.

But their failure to account was material upon an even more serious aspect of the case referred to the

auditor; for upon this "final" accounting it was his duty to ascertain and report any fact which was a bar to their final discharge. The fact that the trustees have not yet fully accounted, is such a bar.

A purpose of the original bill was to obtain an account from Mr. Drury of the property which he had received as executor and trustee (Prayers 3, 4, Rec., p. 9).

The order of April 1, 1899, appointing Maddox and Drury trustees, authorized and empowered them to receive from the executors "all the property whereof the said deceased died seized and possessed" (Rec., pp. 16, 17).

The next order entered in this cause, that of October 18, 1899, directed the auditor "to ascertain and report the amount and character of the estate, real and personal, whereof the late William A. Richardson died seized and possessed, and to state the account of the executors and trustees under the will" (Rec., p. 17).

The auditor's report under this reference, filed December 19, 1900, does not purport to be a statement of the executors' accounts, or of anything except the property which the trustees stated they had received from the active executor, and certain listed real estate (Rec., p. 22). Of this property it is but an "intermediate account," purporting to settle nothing except its handling during the period it covered. It was intended to cover the period from the transfer of funds and property from the Massachusetts executors, April 25, 1899, and it was only by accident antedated to April 1, 1899.

Subsequently the approval of the five intermediate accounts by the equity court, and by the order of dis-

tribution entered July 9, 1909, the cause was retained for the purpose of having ascertained, among other things, "what property, if any, belonging to said estate, remains in the possession of said trustees and not disposed of by this decree" (Rec., p. 37).

It was to carry out this purpose, the present reference was made by the order of February 3, 1910, wherein the auditor was directed "to state the final account of the trustees and the distribution of the trust estate in their hands" (Rec., p. 37).

The auditor stated that the present audit "will terminate their trust" (Rec., p. 38), and upon the overruling of the exceptions the trustees were ordered discharged (Rec., p. 132).

The present accounting therefore stands upon quite a different basis from those preceding it. They were merely annual or intermediate accounts, not litigated and *ex parte*. This is a final one upon an adversary proceeding.

Errors or omissions in those accounts could upon well established equitable principle, be corrected in subsequent accounts, but errors in this final account are irreparable.

It became quite obvious upon this reference that the purposes of the bill and the scope of the first order of reference had been overlooked, and that a hiatus existed in the accounts. Can it be seriously urged that the fact that former annual accounts have been passed by the Court is a bar to the granting of the full relief prayed and evidently intended to be granted or a defense against the present demand for a complete accounting?

The rule is tersely stated in 36 Cyc, at pages 502-4, as follows:

> "A decree rendered on the final settlement of a trustee has the force and effect of a judgment.
>
> . . . . . .
>
> "An annual or intermediate settlement is, as to any matters actually litigated, conclusive upon a subsequent accounting; but as to matters not litigated on such an accounting it is not conclusive.
>
> . . . . . .
>
> "Annual or intermediate accounts are to be taken as only prima facie correct, and may be opened on any subsequent account where error or mistake clearly appears" (Trusts, VI, F).

A case in which the propriety of attacking accounts previously settled, on a later accounting, was considered, was that of Jackson *vs.* Reynolds, 39 N. J. Eq., 313. In that case, upon the fourth account of surviving executors and trustees, objection was urged by the beneficiaries to commissions allowed in three former accounts. By appeal from a decree upon exceptions to the final account, the case came before the Court of Errors and Appeals of New Jersey, which said:

> "It is true that a partial account once settled is deemed *prima facie* correct, and there should be convincing evidence of error before the orphans' court should open it, or upon final accounting should correct it. Here, however, there is no qusetion concerning the presence of evidence upon which the action of the court was grounded, for the error appears conspicuously upon the face of the accounts. That the power existed in

the orphans court to correct the error is, I think, manifest.

"Regarding the method of procedure adopted in the present case, it may be said that probably the better practice in dealing with a partial account, in which an error is alleged to exist, is to attack it directly by a rule to set it aside in respect of the matter complained of. This has the advantage of directness, and in bringing into court parties who may have been interested in the first, but have no interest in the last account. Such parties, for instance, are deceased or discharged executors, or trustees who have settled their account as joint trustees with those still surviving.

"Where, however, the parties to both accounts are identical, there is no apparent reason why the court can not deal with an error in the first account wherever there are exceptions filed in the last account, clearly pointing out the error alleged to exist in the earlier account. All parties have notice, and so have opportunity to be heard."

A similar question was considered by the Supreme Judicial Court of Massachusetts in the case of Blake *vs.* Pegram, 109 Mass., 541, in which the lower court had, upon a last reference of trustees' accounts to the master, directed an inquiry as to whether certain allowances made in former accounts had been "heard and determined . . . as matters in dispute between the parties." The Court said:

"It is not necessary to consider minutely the effect of the additional facts reported and relied on to show that these matters were heard and determined by the probate court at the time the former accounts were allowed; because we are

all satisfied that, if they could not be brought in question without leave of the court, that leave ought to be given, and was properly given. There was in reality no controversy or discussion in the probate court upon these objectionable charges; and whatever assent the guardian *ad litem* gave to the accounts was given without any communication with the ward, and was a mere formality."

And further:

"Another objection urged by the appellees is, that the accounts can be opened only by proceedings to set aside the decree allowing the same, upon an application to be first made in the probate court. . . . But the objections to the allowance of these accounts, as originally filed in the probate court, were, substantially, applications to have the former accounts reopened. The allowance of the accounts in that court, without hearing the objecting party, was a denial of leave so to open them, which gives to this court jurisdiction to grant such leave, at least to the extent covered by the reasons of appeal as assigned."

THE FAILURE TO ACCOUNT WAS NOT CURED BY ACQUIESCENCE.

The court of appeals finds a further bar to the taking of an account covering this period of the trust in "the acquiescence of all parties at interest" (Rec., p. 162).

Acquiescence is a "silent appearance of consent" (Bouvier's Law Dictionary).

In Pence *vs.* Langdon, 99 U. S., 578, this Court said:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge.

> The terms impart this foundation for such action. One can not waive or acquiesce in a wrong while ignorant that it has been committed" (p. 581).

In Matthews *vs.* Murchison, 17 Fed., 760, 766, the Circuit Court said:

> "Acquiescence—that is, assent—is tantamount to an agreement. It is an implied contract, and it requires for its validity the power to contract."

What "parties at interest," having "knowledge" and "power to contract," by their "silent appearance of consent" lost their right to claim that the period prior to April 25, 1899, should be accounted for?

The only child of Judge Richardson, Isabel, died April 4, 1898, leaving as her only children the appellants, who were then infants. The appellants did not become of age until 1904 and 1907 respectively.

Surely no consent can be attributed to Isabel Magruder, who did not live to see a single account of the executors or trustees or to know of their transfer from Massachusetts to the District of Columbia.

Nor can consent be attributed to the appellants. They were the clients of Mr. Maddox until the present reference, and neither they nor their new counsel knew of the gap in the accounts nor of the circumstances of the settlement in the executors' accounts until the testimony was being taken in the audit from which this appeal is taken.

They have had heretofore no knowledge or opportunity of knowledge and until recently have had no capacity to consent.

THE FAILURE TO ACCOUNT IS NOT CURED BY THE PROBATE DECREE OF APRIL 25, 1899.

The auditor and the court of appeals both hold themselves concluded from making an examination of the executor's or trustees' accounts prior to April 25, 1899, by the decree settling the executors' accounts in Massachusetts on that day.

The court of appeals totally misapprehended, or at least misstated, the contention of the appellants on this point. That court, in its opinion, says:

> "Appellants contend that the Probate Court of Massachusetts had no jurisdiction to probate the will" (Rec., p. 159).

The appellants do not so contend.

The appellants do contend, however, that the order passed in Massachusetts on April 25, 1899, is, and appears on the face of the Massachusetts record to have been intended by that court to be, inoperative to diminish the accountability of the executor and trustees to this court.

The court of appeals treats the appellants' contentions as though the present were an attempt to impeach or refuse credit to the adjudications of the court of Massachusetts. Nothing could be further from the truth. Nothing that the Massachusetts court intended to do is sought to be undone by the appellants.

What that court intended was to discharge George F. Richardson and Samuel A. Drury as executors from further accountability to that, the court of their appointment, and to transfer the administration of the trusts

created by the will of Judge Richardson to the equity court in the District of Columbia.

The appellants desire neither to compel Mr. Richardson or Mr. Drury to account further to the Massachusetts court, nor to complain of the surrender of jurisdiction by the Massachusetts court to the District Court.

The appellants do, however, seek to compel Mr. Drury to comply with the terms imposed, expressly and impliedly, by the Massachusetts court and by the equity court, as conditions to the transfer of the accountability from Massachusetts to the District of Columbia.

Those terms were that all the property whereof the deceased died seized and possessed should be accounted for to the equity court.

The averments of the bill and answer, and the order of April 1, 1899, are consistent only with such an accounting, and have already been quoted.

The petition of the executors to the Massachusetts court, dated in Washington, April 4, 1899, set up that the probate of the will in Massachusetts was a mistake that the will should have been probated in the District of Columbia, and prayed, not an accounting in Massachusetts, but that the executors might be "authorzed to pay over said trust funds to said trustees appointed in said Supreme Court of the District of Columbia as aforesaid, and that upon such payment they may be discharged from further responsibility by decree of this Court" (Rec., p. 86).

The decree of April 11, 1899, entered by the Massachusetts Court, recited "it further appearing to the satisfaction of the Court that the laws of the District

of Columbia secure the due performance of said trust;" it described the petition as one "to pay over *all the trust funds* held in trust by them," and decreed that Richardson and Drury pay over "*said trust funds* to the said Samuel Maddox and Samuel A. Drury, Trustees as aforesaid" (Rec., pp. 87-88).

It was after these express declarations of reliance by the Massachusetts court on the supposed assumption by the District of Columbia courts of the entire burden of administering this estate, that there was presented to the Massachusetts court the final account of the executors, classifying into several grand totals the expenditures made by them in administering the estate and in performing the trusts created by the will, together with the consent and request for its allowance by the trustees, who had been appointed in the District of Columbia and whose due performance of their duties was, it appeared to the Massachusetts court, secured by the laws of the District of Columbia. On this consent, the Massachusetts court allowed the account forthwith.

When the circumstances of this allowance are thus considered, it seems incredible that it should be thought that to compel the trustees to account here for all of the funds and property of which Judge Richardson died seized would be to impeach any settlement made by the Massachusetts court, or to fail to give it faith and credit.

On the contrary, it would be a gross betrayal of the faith which the Massachusetts Court had in the courts of the District of Columbia, if the District of Columbia courts do not compel the accounting which was then waived by the Massachusetts court.

Hereinafter separate consideration is given to "What remains unaccounted for and outside the purport of the Massachusetts account" (*infra*, p. 72), and also to the fact that "The probate account and its allowance concluded nothing except the executor's discharge in Massachusetts" (*infra*, p. 74). What is said under those subtitles would be equally relevant here.

THE TRUSTEES ARE ACCOUNTABLE FOR DIMINISHING THE ESTATE.

The Massachusetts Court had at least a right to assume that the trustees who were then vested with the right to all of the funds of the estate, without diminution, would be held accountable for any acts by them in diminution of the estate. The consent to the Massachusetts account was such an act, and for that act they were and are accountable to the District of Columbia courts.

It is error to say, as do the appellees and the courts below, in effect, that the trustees got nothing until April 25, 1899. They may, theoretically, have received no funds or tangible assets, but they did, as soon as they qualified in April 4, 1899, get the power, control and right of possession of the entire estate. On April 11, this right was conceded and recognized by a decree of the Massachusetts Court. They had the *jus disponendi*, even if they had not yet the possession, and they exercised this *jus disponendi* by endorsing their consent on the Massachusetts account. It is submitted that their responsibility and accountability to this Court for that act is inescapable and undischarged.

Summary of supposed bars to inquiry.

The appellants therefore confidently assert that no bar to a complete accounting is to be found in any of these matters, neither in the scope of the reference, in the settlements of the former accounts, in "acquiescence," nor in the allowance of the Massachusetts account.

What remains unaccounted for, and outside of the purport of the Massachusetts account.

To make even more plain the error of cutting off inquiry as to the trustees' acts prior to April 25, 1899, a consideration of the scope of the account allowed by the Massachusetts court is profitable.

The Massachusetts record purports to be only an account of the proceedings of the executors to that date. Conceding to it the greatest possible effect, it represents a marshalling of the assets of the decedent to pay contractual and testamentary charges upon his estate. Those assets consisted of personal property inventoried at $328,124.57 (Rec., p. 85). Attached to the inventory was a schedule of real estate inventoried at $39,800.

The account to which the trustees consented and which the court allowed, charges the executors only with the *personal property*, according to inventory, increased by the income, which includes $7,218.96, "Receipts from real estate," but does not include or purport to account for the $39,800 of realty (Rec., pp. 89-90).

No pretense is made that the executors account covered the executors' and trustees' dealings with the realty, except by the general claim of credit for a lump

sum of $49,705.31 spent for "repairs, taxes, prior mortgages, etc." What properties were acquired or freed from encumbrance by the expenditure of this sum is not shown.

Nor is it to be believed that the appellees or the courts below would, if their attention were properly arrested, hold that Mr. Drury, as a devisee in trust of real estate situate in the District of Columbia, was subject to be called to account for his acts by the probate court of Massachusetts, merely because the will was probated and the executor accounted there. As to this real estate, the Massachusetts account would have been inoperative even if it had been intended to apply.

The Court of Appeals, in another case, speaking with reference to the assertion that in the administration of the estate of a deceased person a foreign court could not decree the sale of land in the District of Columbia, said, "we deem it unnecessary to cite authorities in support of a proposition so elementary." (Plumb *vs.* Bateman, 2 App. D. C. 156, 166.)

This realty consisted of six pieces of improved real estate in the District of Columbia,—the homestead occupied by the family and five under rental,—one house and lot in St. Louis and one tract in Colorado (Rec., p. 85).

All of this was devised to Drury and Richardson and taken in charge by Drury at the death of Judge Richardson on October 19, 1896. The Massachusetts probate court had no jurisdiction over Drury with relation to it. The bill in this cause demanded an accounting of it. The answer submitted Drury as ready to account. The order of reference of October 18, 1899, directed an accounting.

No accounting has yet been rendered of the period prior to April 25, 1899. Yet the court of appeals fails to distinguish this from the personal estate in the possession of the executor and holds that the supposed adjudication of April 25, 1899, puts an end to all accounting for acts prior to that date.

According to the bill, the answer and the opinion of the court of appeals, there was even other property in respect of which no attempt has been made to account.

The bill (par. 6, Rec., p. 7), avers that Judge Richardson had in Massachusetts "one or two parcels of unproductive real estate of trifling value."

The answer of Drury admits in Massachusetts "one or two pieces of real estate of little value" (Rec., p. 15).

The court of appeals, after having put into the mouths of the appellants the useless argument that the Massachusetts court had no jurisdiction to probate the will, proceeds to demolish it by observing "it appeared that the testator had some real estate in Middlesex County, Massachusetts, and this gave jurisdiction," etc. (Rec., p. 159).

Mr. Drury, who took oath to the completeness of the inventory, does not mention this property. Despite its location in Massachusetts, this real estate also is eliminated from this executors' account, which is now argued to be a complete accounting to its date.

THE PROBATE ACCOUNT AND ITS ALLOWANCE CONCLUDED NOTHING EXCEPT THE EXECUTOR'S DISCHARGE IN MASSACHUSETTS.

The erroneous conclusion of the courts below has been so apparent, even assuming the Massachusetts account to be operative and conclusive, that it has not been

necessary to state the appellants contention as strongly as the facts warrant.

The truth is that the Massachusetts account may be wholly disregarded, so far as the present accounting is concerned.

This conclusion seems to appellants to be inevitable upon the facts. It was but a formal consent allowance. The parties entitled to the residue, the trustees, had consented, and their consent left nothing for the Court to do except to recite the consent and carry into effect the desire of all parties concerned by formally passing the account.

If it had not been for the order to transfer the property and administration to the District of Columbia, this consent and formal approval would have been impossible, for then the parties entitled to the residue would have been the beneficiaries, who were infants, and despite whose consent the Massachusetts court would have been obliged to examine the account.

That a trustee has no power to bind a trust estate by his consent to an uncontested order which adversely affects the interests of his beneficiaries, whose interests have not been represented to or considered by the court, is well settled on the authorities.

In Mallory *vs.* Clark, 9 Abb. Pr. Rep. (N. Y.), 358, a sum due a former trustee was secured to him by a judgment confessed by his successor, under the direction of an equity court. The court, per Ingraham J., held the procedure improper, and said:

> "I find, on examining these proceedings, it is not stated that the infants were represented, or in anywise had a part in settling the amount due to the

trustees. Mr. Chatfield, as guardian to the infants, had notice of the proceedings for the change of trustee, but the settlement of the accounts of the plaintiff was not made before the referee named, but appears to have been made by the trustee and some of the parties in interest, who were of age.

"If this be so, the account should be adjusted before the referee, and after the balance is ascertained, the former order should be amended, so as to direct, etc."

In Mallery *vs.* Quinn, 88 Md., 38, decided by the Maryland Court of Appeals in 1898, Henry W. Clagett was the sole surviving trustee of two trusts, one designated as the Mrs. Contee trust and the other as the Elizabeth Bowling trust. Jemina Bowling in 1897 borrowed three thousand dollars from Roberts and Clagett, the then trustees of both trusts; which debt was owned by both trusts, a single bill for one thousand five hundred being given each. In 1894, Jemina Bowling was a distributee of the Elizabeth Bowling trust and entitled to a payment in excess of this three thousand dollars; she had no interest whatever in the Contee trust. She petitioned the Circuit Court for Prince George's County in the cause in which the trusts were administered that Clagett might be empowered to release the three thousand dollar mortgage and charge the amount against the funds payable to her out of the Elizabeth Bowling trust funds. Clagett, who was sole surviving trustee under both trusts, subscribed his assent to passage of order prayed for, and on May 5, 1894, an order was

entered authorizing him to release the mortgage as prayed. The following day Clagett executed the release.

Ultimately in 1896 Clagett was found to be a defaulter to both funds.

In 1896 in same cause the beneficiaries of the Mrs. Contee trust filed the petition now considered to set the order of May 5, 1894, aside.

The court said (p. 45):

> "The order of May the fifth was obviously, in so far as the beneficiaries under the Contee trust were concerned, purely *ex parte*. Not only was no notice given but no possible opportunity to be heard was afforded. The petition was not filed until after the order appended to it had been signed. . . . It depletes a trust fund of an investment without cause; and in fact releases Mrs. Quinn from the obligation to restore to the Contee trust estate . . . money which she had actually borrowed from that estate. There was not the slightest justification for the passage of the order, and it cannot be doubted that the Judge who signed it never would have sanctioned it if he had been apprised of the fact that Clagett was, at the time, insolvent and a defaulter and that the *cestuis que trustent* were ignorant of the application made to him. There was, confessedly, no hearing on the merits of the petition on which the order was founded. The fact that it strips a trust fund of an investment without consideration and to the certain prejudice and injury of that fund, conclusively demonstrates that it ought never have been signed."

The absurdity of treating the order of allowances more than a transfer of the assets and responsibility to

the District of Columbia, is well illustrated by supposing that the executors had delayed for another month, or for two months, or for a year, and had meantime received and expended some of the property for which they have been held accountable here, and then had filed an account in Massachusetts which should have had on it the assent of the trustees. The trustees would be as much relieved by such an account and approval as they were by the account and approval which took place.

According to the appellees, the trustees had it in their power to prolong their period of non-accountability indefinitely, subject, perhaps, to the coming of age of the beneficiaries, and their being able to protect themselves.

THE FAILURE TO ACCOUNT IS IMPORTANT; THE TRANSACTIONS WERE NUMEROUS.

Some indication is given of what Mr. Drury as trustee did between the death in 1896, and the beginning of the trustees' account in 1899 by these entries in the consent account filed in the probate court to cover this period:

Receipts from real estate	$7,218.96
Expended on real estate in repairs, taxes, prior mortgages, etc	49,705.31

(Rec., pp. 89, 90).

Also in the recital of the matters upon which the $18,800 is reported as the "expense of administration," for there appears this statement, "the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about $50,000

for repairs on real estate, the taking up of prior mortgages, taxes, etc."

At no time and to no court have the executors or the active executor or the trustees revealed the items which go to make up these totals.

Some transactions, presumably included in these items, are set out in the trustees' statement filed by the auditor with his report as "Auditor's Exhibit, No. 3" (Rec., p. 96). In this statement is a list of the real estate and a summary of the transactions in connection with each piece, to support the trustees' claim for compensation.

There are thirty-one parcels of real estate enumerated in this list (Rec., p. 118).

Among these 31 are included 4 out of the 8 mentioned in the inventory (Rec., pp. 85, 118, 119).

Including these 4, there are 18 out of these 31 which were acquired prior to April 25, 1899; or to put it differently, excluding these 4, there are here enumerated 27 pieces of real property in the District of Columbia, all acquired by Mr. Drury out of the personal estate; out of which 27, more than one-half, or 14, were acquired during this period from the death to the date of the Massachusetts account.

It becomes plain, then, that Mr. Drury, the active executor and trustee prior to April 25, 1899, converted a large portion of the personalty into real estate during the period for which he is now held not accountable.

At least one parcel of this real estate seems to have been acquired by Mr. Drury even before the inventory of February 23, 1897. According to this statement Lots

41 and 42, Square 107, being 1824-1826 L Street, Northwest, were acquired by foreclosure in January, 1897 (Rec., p. 120). So far as can be ascertained by the scanty traces of these transactions, this is the only parcel which the estate owned in February, 1897, in addition to the eight parcels which Mr. Drury then swore constituted the "Real Estate in Detail" (Rec., p. 85).

POINT II.

The Trustees' failure to account in this cause for the specific fund of $18,800, which they withdrew from the trust funds, and then procured to be allowed to the Executors by the Massachusetts probate decree of April 25,1889.

The one item that is most conspicuous of the trustees' transactions during the period unaccounted for is the item of $18,800 "expense of administration" (Rec., p. 90).

This item is rightfully conspicuous because of the circumstances and time of its insertion into the executors account, and it became accidentally conspicuous by the oversight of the trustees in making up their first account to the equity court (Rec., p. 98).

The circumstances of its insertion have already been set out herein (Supra, pp. 31-36).

Little comment is needed to demonstrate that if the Massachusetts probate court read or considered the account or regarded anything except the trustees' consent and the expected full accounting in the District of Columbia, that Court was grossly deceived by those who prepared this account.

The account purported to carry not a penny of compensation.

Yet out of this item of "Expense" allowed to the executors, the active one of them was to receive, it was understood, $14,600, the inactive one was proffered $1,000 and, though he refused it himself, did not see that it was restored to the beneficiaries.

This deception was doubtless induced by the rule of court printed conspicuously at the top of the Massachusetts account form, which refers to section 2 of Chapter 150 of the Revised Laws of that Commonwealth:

> IX. "No executor or administrator shall receive any compensation by way of a commission upon the estate by him administered but shall be allowed his reasonable expenses incurred in the execution of his trust, and such compensation for his services as the court in each case may deem just and reasonable. The account shall contain an itemized statement of the expenses incurred, and shall be accompanied by a statement of the nature of the services rendered and of such other matters as may be necessary to enable the Court to determine what compensation is reasonable" (Rec., p. 113).

The mistake which the trustees made of supposing that their account should begin from April 1st, and include this amount, was indeed a natural one, as from April 1st, they were as truly in possession of this fund as they were on April 25th. Mr. Drury had held it as executor. He and Mr. Maddox, the other trustee, not he and Mr. Richardson, the other executor, were in the Sunday conference which allotted this $18,800 to be divided. (Supra, p. 32.)

All the reasons which compel an accounting of the estate from the death to April 25, 1899, apply to the failure to account for this $18,800, and in addition there is the significant element of large personal profit. Some court ought to decide whether Mr. Drury was then entitled to $14,600 as compensation, and Mr. Maddox to $1,500 as a legal fee. No court has yet decided. No court has had the question before it. Even the Massachusetts formal and consent decree was obtained by misrepresentation.

The Court of Appeals of Virginia had occasion in the case of Miller *vs.* Holcombe's Ex. *et al.* (9 Gratton, 665), to consider a compromise of a litigation, consented to by a trustee, out of which the trustee obtained a profit, and the opinion delivered by Lee, J., concurred in by all of Judges of that court, is quite applicable here. Holcombe was a trustee, constituted as such by a deed of trust from Harrison. Harrison while still in control of his own affairs, had procured a decree rescinding a contract to purchase a tract of land from Calloway, on the ground of a defect in the title. Calloway had appealed from the decree. Holcombe, coming into control of the litigation as trustee, settled the case by consent of himself and Calloway, taking the land himself, and eventually realizing a profit. The Court said, (p. 677):

> "This profit, it is insisted, should be carried to the credit of the trust fund; while it is contended on the part of Holcombe, that this transaction was a purchase by him individually of the land from Calloway; and that he is entitled to claim the benefit of it as such. And the Circuit Court sustained the pretensions of Holcombe in this respect.

"It is a well settled doctrine that where a trustee or other person standing in a fiduciary capacity, makes a profit out of any transactions within the scope of his agency, that profit will belong to the *cestui que trust*. . . . And it seems to me that Holcombe was brought in the transaction in question, within the influence of the rules on the subject. He availed himself of his office of trustee to make this compromise: the thing compromised was the decree in favor of Harrison, part of the trust fund. . . . .

"The principal on which the prohibition to one standing in a fiduciary character to deal with the trust subject with reference to his own individual interests, rests, is that not only would it be contrary to the design under which he had obtained control of the subject, but he would be placed in such a situation as that his interests might, in reference to the conduct of the trust, by possibility come into conflict with those of the *cestui que trust*. 2 Spence's Eq., 299; 2 Fonb., 189. And this case furnishes a most apt illustration of this principle. It will be remembered that at the time this compromise took place, the amount due from Calloway to Harrison was unascertained, depending upon an account ordered by the court to be taken of the amount paid by Harrison, upon the purchase, on the one hand, and the rents and profits of the property during the time it was held by him, on the other. Now in this state of the case, it was Holcombe's bounden duty to see that the account was taken correctly, and that the full amount paid was allowed, and not more than the just value of the rents and profits charged against it so as to make the net balance accruing to the fund as large as it might be. But after the com-

promise, as he is to pay according to his account, only what is actually due to the trust fund, it of course becomes his interest to reduce the amount as much as possible; and thus that very conflict between duty on the one hand and interest on the other is brought about, which the court of equity by its rules, seeks to avoid.

"It is vain to say that the arrangement was a judicious one, yielding more to the fund in the credit actually given, than it was really entitled to. The Court will not go into that inquiry, but requires that the whole profit yielded shall be accounted for."

The application of this sound expression to the present case is of course obvious. As trustees, it was the duty of Drury and Maddox to see that the allowance of "expense," which they knew meant "compensation," was no larger than was proper. But, inasmuch as the larger it was the more was to be received by them, it became to their individual interest to increase this allowance, and "thus that very conflict between duty on the one hand and interest on the other is brought about," which the appellants claim compels an examination into the propriety of their consent to this allowance.

The trustees, as trustees by virtue of the authority and title vested in them by the equity court in this cause, made the withdrawal of this fund possible by their *consent*. For signing that consent they are as truly accountable to this court as they would be had they signed a check as trustees, for the effect was the same.

POINT III.

The trustees' accountability for the profits realized by Mr. Drury from sales of notes to the trust estate.

The appellants assigned as error the discharge of the appellees as trustees without taking into account the fact that one of the appellees had made profits out of his dealings with the trust estate, and without directing an inquiry into the profit derived from the transactions of the partnership of which he was a member, with the trust estate, in the nature of sales to that estate of negotiable paper bought at a discount by this partnership.

The appellants further assigned as error the holding of the auditor and the courts below that the making of this profit was immaterial with regard to the right of the appellees to compensation, and with regard to the amount of that compensation.

The appellees seek to separate the profits from the dealings with the trust estate.

The appellees have not contended that these transactions were not reviewable in this accounting. The court of appeals held that:

> "Dealings with the partnership of Arms & Drury by trustees, one of whom was a member of the partnership, call for the closest scrutiny of each and every such transaction" (Rec., p. 164).

The rule forbidding a trustee to make personal profits out of his dealings with the trust estate is not directly attacked either by the appellees or the Court of Appeals. They also admit that Arms & Drury dealt with the trust estate; but have contended and held that no loss thereby

came to the estate and that no profit thereby came to Mr. Drury.

The appellants contend that Mr. Drury did thereby profit, and that this profit must be accounted for, irrespective of loss to the estate; and further that, as the trustees defend against further accounting upon the claim that no loss came to the estate by their dealings with it, it is incumbent on them to prove that fact, and this they have not done.

All of the appellees' contentions on this point were adopted by the auditor and the court of appeals.

These tribunals held that these profits were made out of that part of the transactions in question which preceded the dealings with the trust estate, viz, in the purchase of paper subsequently sold to the trust estate; and that no loss came to the estate, inasmuch as the trustees assert the estate eventually received in each case the face value of the notes bought from Mr. Drury and his partner.

As to the making of profits by the trustees, their contention was thus stated by Mr. Drury (Rec., p. 66):

> "I should say that the profit from the sale of these notes was nothing; the profit from the purchase of these notes was something."

This conclusion is adopted by the auditor who states (Rec., p. 42):

> "No profit was made by the firm of Arms & Drury in the sales of the notes to the trustees. . . . The objection narrows itself to a claim that Drury should . . . make a gift to the estate of profits on his individual moneys, to which the estate is in nowise entitled."

The Court of Appeals comes to the same conclusion in these words (Rec., p. 164):

> "We do not think that Drury, under any principal of equity, can be called upon to surrender to his beneficiaries his profit made in previous transactions with other persons and at their expense, simply because he and his co-trustee subsequently purchased the paper in the securing of which those profits had been made, and in which purchases no profit was made, or expected to be made, at the expense of the estate."

The error which appellants most confidently assert is contained in these statements of the trustees and the court below is not one of fact, for it is but a conclusion ill-founded upon the facts which are so conspicuously admitted in the record.

THE PROFITS WERE MADE AND REALIZED UPON THE SALE TO THE ESTATE.

The fundamental error is embodied in the above quoted statement of Mr. Drury; for the transactions of Mr. Drury's partnership were not completed when the purchase was made. The partnership traded,—it bought to sell. The value of the notes so traded in, was at all times a matter of opinion, founded upon the rate of interest they bore and the risk involved. Mr. Drury's business was the buying of such notes at what he and a vendor considered them worth and selling them at what he and a purchaser thought them worth. When he bought them he had not realized a profit, nor did he until he found a purchaser who thought them worth more than he had paid for them, and had received from that purchaser the sale price so agreed upon. It was neither

by the purchase alone nor the sale and payment alone that profit was made, but by the sum of the two transactions.

The vice of the selling transactions now criticised was that here his opinion of the value was matched not with a stranger, but with his own in a fiduciary capacity. It does not matter what is the court's opinion as to whether he did or did not exercise the same purchasing judgment in his fiduciary capacity that he would have exercised if he had not been at the same time, for himself, exercising selling judgment. The policy of the law is to credit the trust estate with what profit he thus made for himself.

Furthermore, it is obvious that in purchasing such notes on his own behalf, Mr. Drury, because he was trustee and controlled trust funds, knew when funds of the trust would be available with which to take off his hands these notes. The trust estate as a prospective purchaser possessing cash was necessarily a factor in his determination to purchase notes. No one in his situation, with the highest of motives, could have forgotten that there awaited a ready sale for his discounted purchases.

IT IS NOT CLEAR THAT THE TRUST ESTATE LOST NOTHING.

If a profit did result to the trustees, it is as a matter of law immaterial whether or not a loss resulted to the trust estate.

No testimony was introduced to support the assumption that the estate lost nothing. Not one transaction was traced. The assumption rests merely on the trus-

tees' assertion that the estate realized in each instance face value on the notes.

As a matter of fact, however, it does not follow that because the estate realized face value on the notes, it lost nothing when it bought. The value of these notes when the estate bought them was a matter of opinion; their value was not necessarily their face value. Therefore, to determine whether there was a loss, the values, considering the interest they bore and the risk involved at the time of purchase, must first be determined, for a comparison of value and price paid is the only test which could determine whether there was loss to the estate in the purchase of the notes.

No impartial determination was made of their value when they were sold to the trust estate, because Mr. Drury participated in that determination, and his interests were adverse.

The fact that face value and interest at the face rate were ultimately realized does not alter retroactively the value at the time of the purchase. It may be that the estate was merely fortunate in realizing ultimately *more than* the real value of these notes had been at the time of their purchase; or it may be that considering the risk and rate of interest the estate should have realized a greater return on its investment. Certainly the determination of a trustee whose personal interests were adverse is not conclusive of the fairness of the purchase transaction.

The estate lost at least one thing to which it was entitled, the disinterestedness and single mindedness of its trustee.

THE PRINCIPLES CONTENDED FOR BY APPELLANTS HAVE BEEN CLEARLY STATED BY THIS COURT.

All of the above considerations, which would be more apt if the principles involved in this case were novel, would be quite superfluous except for the surprising acquiescence of the courts below in Mr. Drury's theory that his profits were in purchases, not sales, because the sales were at face value, and that the estate could not complain because, they said, it lost nothing. The fact that his sales to the trust estate were for sums in excess of what he paid for what he sold, is, upon the settled doctrines of this court, a sufficient answer to this theory.

In Michoud *vs.* Girod, 4 How., 503, decided in 1845, the familiar case wherein an executor had, through a third party, purchased from himself as executor the property of his testator, and the beneficiaries years afterward brought a bill in equity to obtain an accounting of the transaction, this court said (p. 553):

> "It matters not, in such a case, whether the sales are made with or without the sanction of judicial authority, or with ministerial exactness. The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not,—*per interpositam personam*,—carries fraud on the face of it."
>
> . . . . . .
>
> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents,

public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on accouunt of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells" (p. 555).

In the case of United States *vs.* Carter, 217 U. S., 286, decided in 1910, the same doctrines were adhered to and applied in the face of contentions similar to those here made.

Carter, the defendant, was an officer of the United States in charge of certain public works, and received from the contractor a certain proportion of his profits. It was contended there, as here, that it did not appear

that the principal had lost anything by the agent's independent dealings with his trust. The Court said (p. 305, et seq.):

> "If it be once assumed that the defendant Carter did secretly receive from Greene and Gaynor a proportion of the profits gained by them in the execution of the contracts in question, the right of the United States in equity to a decree against him for the share so received is made out. It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, 'You can not show any fraud, or you can not show that you have sustained any loss by my conduct.' Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

"The doctrine is well established and has been applied in many relations of agency or trust.

. . . . . .

"Thus, in *Aberdeen Railroad Company* vs. *Blaikie Brothers*, 1 MacQueen's Appeal Cases, 461, 472, it was applied to a contract of a director dealing in behalf of his company. Lord Chancellor Cranworth, in respect to the general rule, said:

. . . . . .

" 'It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better.

" 'But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

" 'The principle was acted on by Lord King in *Keech* vs. *Sanford*, and by Lord Hardwick in *Whelpdale* vs. *Cookson*, and the whole subject was considered by Lord Eldon on a great variety of occasions.' "

See, also—

II Pomeroy's Equity Jurisprudence, secs. 1675, 963, 958.

White *vs.* Sherman, 168 Ill., 589, 611.

Jarrett *vs.* Johnson et al., 216 Ill. 212, 219, 220.

Bay State Gas Co. *vs.* Rogers, 147 Fed. R., 558.

City of Findlay *vs.* Pertz, 66 Fed. R., 427,435.

POINT IV.

The performance of the trust imposed upon the trustees by the decree of their appointment is not completed, because a part thereof, called the "Eliza C. Magruder, trust" remains unexecuted, and the trust property remains in the possession of the trustees.

The Court of Appeals held that the decree of the equity court was wrong in one particular, that is, in that it *apparently* terminated the portion of the trusts administered by the appellees under the decree of April 1, 1899, which was for the benefit of Eliza C. Magruder for her life.

Attention is therefore only briefly called to the clause in the Eliza C. Magruder declaration of trust, executed by Judge Richardson, as follows:

> "Upon my decease, all the trusts, powers, duties, obligations and discretions vested in me by said deeds and this declaration are to vest in and be executed by my executor or executors or whosoever settles my estate in the same manner as they vest in me" (Rec., pp. 21-22).

Undoubtedly the persons in whom these trusts were vested when the equity court on November 15, 1910, entered the order discharging the appellees as trustees, were the ones embraced in the description "whosoever settles my estate;" and the persons then settling the estate of Judge Richardson were the appellees.

The appellees had not discharged all of the trusts created by the will of Judge Richardson until they had

discharged these Eliza C. Magruder trusts, for it was only to execute the trusts created by the will that they were appointed by decree of the equity court; and thereunder they immediately assumed and without interruption continued to exercise the powers vested in Judge Richardson under the Eliza C. Magruder trust.

The order appointing the trustees therefore remains in part in force, and it is indisputable that the trustees should not be finally discharged from their duties thereunder and their final account thereunder can not be stated.

Judge Richardson certainly did not contemplate a final discharge of the trustees who should settle his estate until the Eliza C. Magruder trusts were fully administered and he certainly did not contemplate that the trustees who should settle his estate should be compensated as for a task *completed* with honor and integrity, until the Eliza C. Magruder trusts should be fully administered.

POINT V.

The erroneous allowance of compensation to the trustees and the erroneous fixing of the amount thereof.

The appellants contend, first, that the allowance made was excessive, because it was based upon an erroneous principle and upon of a misapplication, of the principle adopted, to the facts of the case, and second, that no compensation whatever should be allowed to the trustees, because of the mal-administration of the trust.

THE SERVICES FOR WHICH COMPENSATION WAS CLAIMED WERE NOT OF A CHARACTER TO MERIT THE AMOUNT ALLOWED.

There can be no dispute of the facts that the auditor and the court of appeals based their findings as to the amount of compensation upon the assertions made by the trustees and contained in the unsworn statement signed by them and designated Auditor's Exhibit 3 (Rec., pp. 96-128).

It is the multiplicity of the items there enumerated that appears to have impressed the auditor and the court of appeals. Summaries contained in this statement, purporting to show the numbers of notes, payments, investments and reinvestments, were copied by the auditor and again copied by the court of appeals in its opinion as showing the right of the trustees to claim the compensation allowed (Rec., pp. 44, 155-156).

The services so rendered by the trustees, excepting the professional services for which Mr. Maddox was separately paid, were the services to which importance seems to have been attached, and were conspicuous only because of the multitude of small transactions involved. These transactions were carried on by the in large measure clerical force of the firm of Arms & Drury, and for their payment the trustee's commissions of Mr. Drury were covered into the funds of that firm (Rec., p. 66).

It is conceivable that an appropriate commission on the *income* for its collection may be properly increased because of the magnitude of the clerical services involved; but a commission was here claimed and allowed on the

corpus or *principal* of the estate. Such a commission is to be allowed, if at all, in consideration of the care and diligence required in preserving intact and undiminished the principal of the trust estate. To determine whether such a compensation is due the clerical labor involved is of little consequence.

Furthermore, the principal of this trust estate was not preserved intact and undiminished, as appears from the summary statement of the results of this trusteeship hereinbefore set out (supra, pp. 45 et seq.).

The appellants submit that little foundation has been laid for claim of a percentage on the principal for the care of this trust estate.

THE AMOUNT, $313,321.34, WHICH THE AUDITOR FIXED AS THE BASIS FOR AN ALLOWANCE OF 5% ON THE PRINCIPAL PERSONAL ESTATE, WAS ERRONEOUS.

Assuming that a commission is to be allowed, of *some percentage*, on the corpus or principal of the trust, it is, the appellants submit, demonstrable that the appropriate sum to be adopted as the value of that principal is less than $313,321.34.

The most conspicuous error in the method by which this sum is arrived at is that it is based upon the amount of the personal estate *received* by the trustees, not the amount *distributed* to the beneficiaries.

The auditor himself elsewhere in his report states that the face or apparent value of the estate when *received* by the trustees was inflated and untrue because of the character of the property in which it was invested.

He says, "When the estate was delivered to the beneficiaries it may be said that practically all of it consisted of the real estate before mentioned, and first trust notes well secured, in contradistinction to the negligible character of the estate when it was received" by them (Rec., p. 45).

Furthermore, it is certainly obvious that if the intention is now to compensate the trustees for their care in the preservation of the principal of the trust estate by a commission on that principal, it is the estate which they have succeeded in preserving which should be the basis of that commission. What they have preserved is what they have turned over to the beneficiaries, not what they have received.

Another error results from the method of arriving at this $313,321.34. It is not arrived at by adding together the several parts of the whole trust estate as they existed at any given date. Contained in it are the value of the personal estate in 1899 and the value of the proceeds of sales of real estate made at various times between 1899 and 1910.

The real estate from which the proceeds were derived had been, or a large part of it had been, bought from time to time during this period of 1899 to 1910. The personal estate received from the executors in 1899 was used in purchasing this real estate and the amount of personal estate was thereby diminished. Yet no account is taken of this diminution in determining what is the gross principal estate.

A large part of the aggregate of $313,321.34 was made up of this property which had been converted from

personal to real estate and again from real to personal estate, and so was twice counted by the auditor. Some idea of the size of the resulting double commission is gained by considering the fact that the aggregate proceeds of sale of real estate included in the total were $62,474.94 (Rec., p. 142), and that of the list of thirty-one pieces of real estate which from time to time had been the subject of investment of the trust funds, contained in the Auditor's Exhibit 3, thirteen were purchased after the executor's account was settled and of course out of the personal estate received from the executor, and of these thirteen several are there stated to have been sold (Rec., pp 118-125).

The auditor refers to this contention and recognizes the fact that he has allowed *some* double commissions, but he has "not felt called upon to further prolong the labor of the audit and increase the expense by recasting the schedules," because he finds upon an informal examination that only two pieces of real estate, the proceeds of which were counted as principal, were bought out of money turned over by the executors and already counted as principal (Rec., p. 44). If this is accurate, the appellants are at loss to understand out of what funds the other pieces of property which the present record on appeal shows to have been bought and sold during this period, were paid for.

In any event the appellants consider that it is error to pass over an admitted inaccuracy in the method of calculating this principal, even if the amount involved had been, as the auditor without a formal examination concluded, only $6,050, on which five per cent would amount to about $300 (Rec., p. 44).

THE PROPORTION OR PERCENTAGE OF COMPENSATION ARBITRARY AND BASED UPON NO EVIDENCE.

The amount of compensation to be allowed, as has already been stated, was ascertained by the auditor by a calculation of ten per cent on the income of the trust estate and five per cent on the principal of the personalty.

The choice of these percentages by the auditor was entirely arbitrary; there was no evidence whatever as to what percentages were appropriate, and there is no statute nor any rule of court in force in the District of Columbia which is applicable.

A decision and opinion of this Court was cited in the argument before the auditor and before the court of appeals and was relied upon, and seems now to be relied upon by the appellees of establishing the correctness of these percentages. The case of Barney *vs.* Saunders, 16 How., 535, decided in the December term, 1853, on appeal from the Circuit Court of the District of Columbia upon exception to the auditor's allowance of commission to trustees "of five per cent on the principal of the personal estate and ten per cent on the income."

In its opinion this Court said:

> "The allowances made by the auditor in this case are, we believe, such as are customary in similar cases, in Maryland and this district, where the trustee has performed his duties with honor and integrity" (16 H., 542).

Assuming that after a lapse of over sixty years these rates of allowance remain "customary in similar cases

in Maryland and this District," it is certainly true now as it was then that such allowances are customary and proper only "where the trustee has performed his duties with honor and integrity."

And in that opinion the Court proceeds to state with clearness, emphasis and particularlity what is meant by the performance of a trustee's duty "with honor and integrity," and also to elucidate certain general principles of equitable jurisprudence and procedure, which are applicable to the present as well as to that case, and which, when applied, exclude the trustees from claiming any compensation whatever.

The principles of the case of Barney *vs.* Saunders which were considered by the appellees and the court of appeals to be controlling in fixing the amount of compensation are considered by the appellants as controlling in defining those duties which the appellees as trustees have failed to perform.

THE TRUSTEES ARE ENTITLED TO NO COMPENSATION WHATEVER BECAUSE OF THE MAL-ADMINISTRATION OF THE TRUST.

Portions of the opinion of this Court in Barney *vs.* Saunders are so applicable to the case at bar, as to suggest that the Court had in mind such a case as the present one. The Court said:

> "While on this subject, we would take the opportunity to remark, on the impropriety of appointing persons to trusts, however high their personal character may be, who are allowed to pay from their right hand into their left; as where A, as administrator, has to settle an account with A as trustee; and B, as trustee, to deal with B as

> guardian. To instance the present case: Saunders, the trustee, whose duty it was to scrutinize the accounts of the administrator *de bonis non*, from whom they receive the trust estate, is himself appointed administrator, and thus left without a check, or any one to call him to strict account except his co-trustee, for many years, and until the ward comes of age. Weightman, the other trustee, is appointed guardian, being the only person who for many years could call to account the trustees for any negligence, mismanagement, or fraud. . . . That the persons appointed in this particular case were highly honorable men, is true; but the same rule should be applied in all cases" (p. 541).

Just this abuse is conspicuous in the present case. Mr. Drury as executor accounted to himself and Mr. Maddox as trustees, to the personal profit of both. The infant beneficiaries were represented only by a guardian *ad litem*, their father, whom the testator had excluded from the devolution of his property, and for whose interests their counsel, Mr. Maddox, also their trustee, Mr. Maddox, said he was more concerned than he was for their interests. And the entire situation was the creation, not of the testator's will, but of the co-operation of Messrs. Maddox and Drury and the guardian to control and use the trust estate.

As to compensation and in definition of the performance with "honor and integrity" which this Court says entitles a trustee to claim commissions at the rate herein allowed, the opinion continued:

> "But on principles of policy as well as morality, and in order to insure a faithful and honest execu-

tion of a trust, as far as practicable, it would be inexpedient to allow a trustee who has acted dishonestly or fraudulently the same compensation with him who has acted uprightly in all respects. And there may be cases where negligence and want of care may amount to a want of good faith in the execution of the trust as little deserving of compensation as absolute fraud. If trustees, having a large estate to invest and accumulate for the benefit of an infant, for a number of years, will keep no books of account, make out no annual or other account of their trust estate; if they risk the trust funds in their own speculations; lend them to their relations without security; and in other ways show a reckless disregard of the duties which they have assumed, they can have but small claim on a court of equity for compensation in any shape or to any amount" (16 How., 542).

These expressions also are applicable to the present case.

Mr. Drury as executor, appointed in October, 1896, made "no annual or other account of his executorship," until in April, 1899, the administration was transferred to the District of Columbia. Under the doctrines of the case they invoke, he "can have but small claim on a court of equity for compensation in any shape or to any amount."

Yet in April, 1899, for his two years and a half of services, Mr. Maddox, as trustee, Mr. Drury himself, as trustee, and Mr. Maddox's friend, the guardian, allowed Mr. Drury $14,600 for his services.

He then paid this fund "from his right hand into

his left," with the "understanding" that Mr. Maddox was to have a share of it.

Assuming that Mr. Maddox, as counsel for the children and as trustee, did not intentionally betray his trust or intentionally deceive the Massachusetts court by designating as "expense" this item which concealed the compensation, but did so merely through negligence, was this not the "negligence and want of care" and the "reckless disregard of the duties which they have assumed," which under the doctrines of this opinion destroy his claim for compensation?

Does not his explanation, that he relied on Mr. Weir, only increase his responsibility, when it is remembered that Mr. Weir represented the Executors and received one thousand dollars of this allowance for himself? Was it not want of care under the circumstances to rely upon Mr. Weir's judgment?

Mr. Drury has made no report to any court of his transactions by way of purchase, management and sale of real estate during the period between Judge Richardson's death and the beginning in April, 1899, of the trustees' accounts filed herein.

Mr. Maddox, who instituted this suit as counsel for the infant beneficiaries avowedly to secure such an accounting, appears to have been content merely to obtain control of the estate by the transfer of its administration here and his own appointment.

All adversary interest seems to have vanished when, by the consent of Messrs. Drury and Maddox, and of no one else, they were appointed trustees herein, charged by the court with the duty, however, of obtaining

possession of *all* the property whereof the said deceased died seized and possessed.

Nevertheless they were content to receive from Mr. Drury as Executor about one hundred thousand dollars less than the reported assets of the estate. Of this diminution $14,600 were paid to Mr. Drury.

To accomplish this, they, almost immediately after their appointment, and without report or notice to the Court appointing them, united as trustees in an application to the probate court whose jurisdiction they had denied in their representations to the equity court, and recommended to the probate court the allowance of an executors' account which was designed to shut off further accountability in respect of the estate to that date.

The reasoning of the authorities which hold that an order entered on the consent of trustees can not be used by them against the cestuis que trust (supra, pp. 75-77, 82), compels the conclusion that their consent to this account was such a breach of duty as constituted gross infidelity to their trust.

Especially pertinent is the reasoning of the case of Miller *vs.* Holcombe's Executors, which has been quoted (supra, p. 82), wherein is so well described the conflict of interest which arises when a trustee "consents" for his beneficiary to his personal profit.

In that case a decree in favor of the cestui was described as a "*part of the trust fund.*" Here, also, the decrees of both courts directing the transfer of all assets to this jurisdiction, were "part of the trust fund," to be realized upon by the trustees. They have not realized in full upon these decrees, but have given away a part of the

proper proceeds to themselves and others without account.

If the doctrines of that case and of Barney *vs.* Saunders are as sound and controlling as they are wholesome, the trustees here "have but small claim in a court of equity for compensation in any shape or to any amount."

This infidelity in the inception of the trusteeship is wholly inconsistent with a claim of the trustees for compensation, as were also the continuous dealings of the partnership of Arms & Drury with the trust estate.

The denial of the appellants' right to have ascertained the amount of the profit so made by Mr. Drury and Arms & Drury presents a striking parallel to the situation described by the Supreme Court of Massachusetts in Blake *vs.* Pegram (supra, p. 65), wherein that court said, in respect of the settlement of a guardian's accounts:

> "The appellant claimed to be entitled to the profits, if any were made beyond the interest, from whatever use her money had been appropriated to. In order to ascertain whether such profits were made, the accountant was called upon to exhibit his books of account, and to disclose the mode in which the money had been used or invested. This he declined to do, denying the right of the appellant to investigate his private affairs, or to inspect his personal accounts.
>
> "The appellant contends that, against a party who thus refuses to disclose the use he has made of his ward's money, it is fairly to be presumed that he has derived profits from its use, sufficient at least to compensate him for the care of it, so as to deprive him of the right to charge other com-

> pensation; and this presumption is especially strengthened when, as in this case, the money was mostly received at a time when currency and gold were equivalent, or nearly so, and paid over in currency and specially invested for the ward after the currency had depreciated to less than one-half the value of gold. The Court adopt this position of the appellant, and hold that the guardian is not entitled to charge any commission in this account."

In view of what has already been said (supra, pp. 94-95) concerning the incomplete state of that portion of this trust known as the Eliza C. Magruder trust, it need only be added here, in the words of this court in Barney *vs.* Saunders, that the trust must be "performed," before a commission on the principal can be allowed. Surely it is only for a completed trust that this court intended approving such an allowance. So long as the trustees are to continue to act under the decree of April 1, 1899, their acts as a whole can not be reviewed and a compensation fixed.

Conclusion.

The decision of the court of appeals gives primary and predominating importance to the question, what recognition and what effect are to be conceded to the decree of the Massachusetts *probate* court of April 25, 1899, allowing the account of the *executors*, upon the duties and liability of the *trustees* to account to the *equity* court under the provisions of the decree of April 1, 1899, appointing them.

In its opinion and with reference to the report of the

auditor stating the final account of the trustees and determining their compensation, the court of appeals said:

> "This report was based on the consideration that the administration and the responsibility of the trustees, under the appointment of that court, extended only to the net balance ordered to be delivered to them by the probate court" (Rec., p. 159).

Making further reference in its opinion to this report and to what it termed the "*settlement*" made by the probate court, "of the accounts of the executors and of the balance required to be delivered to the trustees" the court of appeals said:

> "We think the auditor and the court were right, therefore, in refusing to review that account" (Rec., pp. 162-163).

The court of appeals supports its decision on the ground that the appellants are estopped "now to impeach the settlement" made by the probate court (Rec., p. 162).

The reasons why, upon the conditions recited and upon the facts disclosed by the record, the doctrine of equitable estoppel and of acquiescence have no applicability and can not be considered as a defence or a justification of or excuse for the conduct or attitude of the *trustees* in refusing obedience to the explicit and unrevoked decree of the court appointing them, have already been presented in this brief on pages 66 to 77, to which reference is respectfully made.

If this court shall, however, find that the decree of the *probate* court of April 25, 1899, and not the decree of the *equity* court of April 1, 1899, is to be considered as fixing the extent of the liability of the trustees to account to the equity court and the time when the duty and liability to account actually began, there will remain to be considered by this court the question of requiring of the trustees an *accounting* as to the *profits* realized by the trustee, Mr. Drury, from the purchase of notes by the trustees from Arms & Drury in the course of transactions in which Mr. Drury was really both buyer and seller.

The refusal of the auditor to require such an accounting and the necessity therefor and the right of the appellants thereto in the final accounting and as a prerequisite to the discharge of the trustees are presented in this brief on pages 85 to 94, and also on pages 63 to 66, to which reference is respectfully made.

There will also remain to be determined the question of the *compensation* to be made to the trustees for their services, which can not be finally ascertained and determined until their services have been completed, and until their trust has been fully and completely executed, and the question whether the trust can be considered completed and fully performed and their compensation determined while the part of their trust, referred to as the Eliza C. Magruder trust, remains unexecuted and the property belonging to the trust remains in the possession of the trustees and their accounts in respect of that property remain unsettled.

The view and contentions of the appellants on these questions, viz., the question of the non-completion of the Eliza C. Magruder trust and the question of the compensation due the trustees are presented in this brief on pages 94 to 107.

The judgment of the court of appeals of the District of Columbia should be reversed.

NATHL. WILSON,
Of Counsel for Appellants.

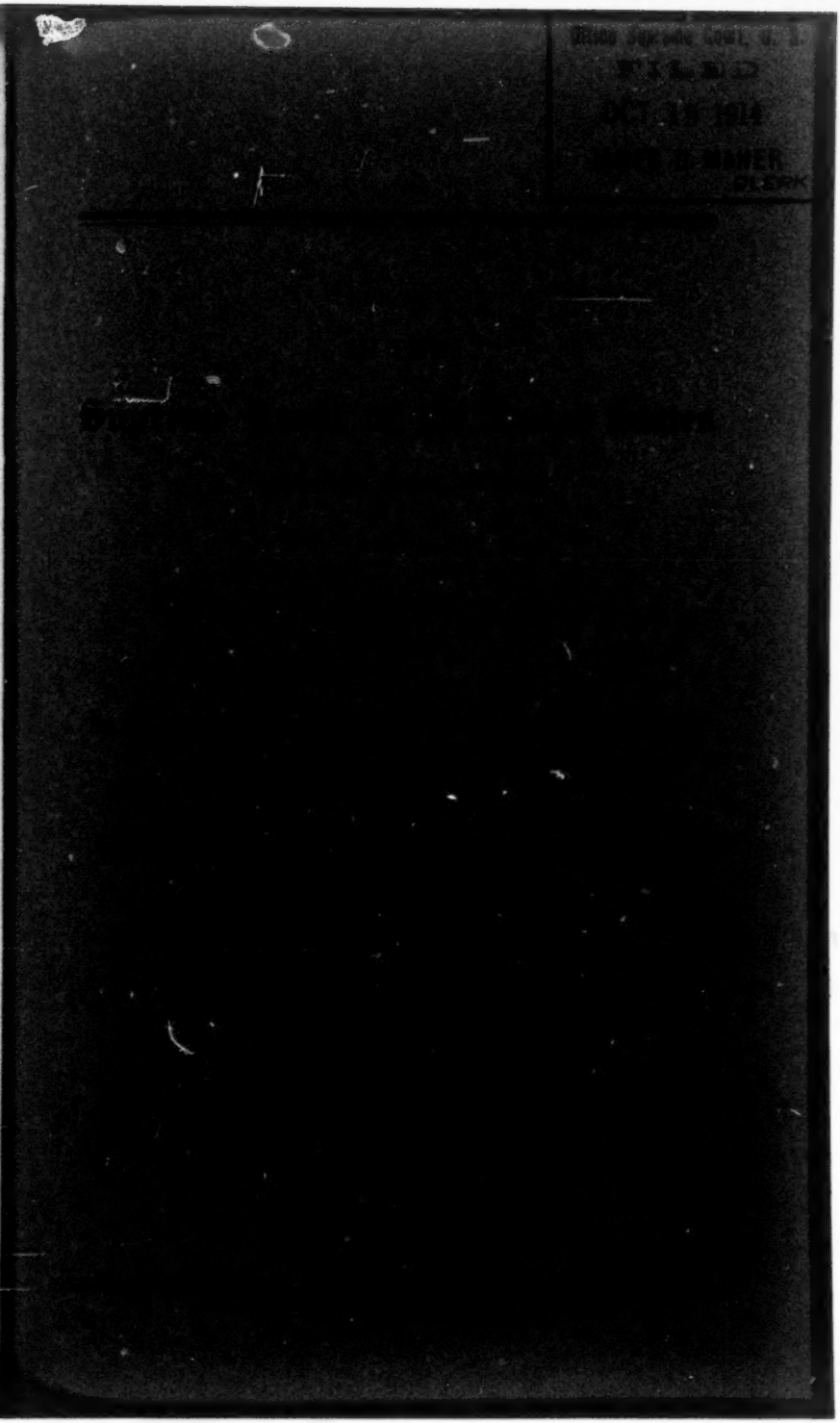

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TABLE OF CASES.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 17.

ALEXANDER R. MAGRUDER AND ISABEL R. MAGRUDER
Appellants,

vs.

SAMUEL A. DRURY AND SAMUEL MADDOX, Trustees,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT.

Hon. William A. Richardson, Chief Justice of the United State Court of Claims, died October 19, 1896, leaving a last will and testament, in which he described himself as "a citizen and inhabitant of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, and hav-

ing property in said county." In the seventh paragraph of the will he directs that, if the appointment of a guardian for his grandchildren should be necessary, "some Massachusetts man be selected for the trust;" that, in case of the resignation or death of his brother, George F. Richardson, named as executor and residing in Massachusetts, in his place "there be appointed a Massachusetts man," but that, in case of the death or resignation of Samuel A. Drury, who was a resident of the District of Columbia, where the testator had a large amount of personal property, consisting principally of second trust notes, "one of the best business men of Washington, like him," or one of the loan and trust companies, should be appointed in his stead. The will was probated in Massachusetts, letters testamentary issued to George F. Richardson and Samuel A. Drury, the executors named in it, who duly qualified and proceeded with the administration until March, 1899, a period of two and one-half years. In the fall of 1898 an attempt was made by the State of Massachusetts to impose personal taxes, amounting to about $7,500 annually, on the assets of the estate in the hands of the executors.

When knowledge of this assessment was brought to the attention of Dr. Magruder, father and guardian of the plaintiffs, counsel were employed and an original bill filed in this cause against Samuel A. Drury and George F. Richardson by the beneficiaries under the will by their father as next friend, alleging that the last domicile of the testator, notwithstanding the recitals of his will, was the District of Columbia, and that all of the assets and personal securities of the estate were in the keeping of Samuel A. Drury in the District of Columbia. The bill prayed that defendants might be enjoined from paying out of the estate any taxes to the State of Massachusetts; that an account should be taken of all the property and estate that had come into the hands

of the defendants as executors and trustees under the will, and that they might be required to file accounts from time to time and as often as might be necessary, showing the moneys received by them and the disbursement thereof. The fifth prayer of the bill was that, if George F. Richardson had filed his resignation as executor or trustee, as plaintiffs had been informed, then that some fit and proper person might be appointed in his place and stead. The original bill was filed December 31, 1898.

No further proceedings were had on the original bill, and, for the reason that George F. Richardson would not submit to the jurisdiction of the courts of the District (R., p. 77), an amended bill was filed, in March, 1899, naming Samuel A. Drury as sole defendant. This amended bill averred that George F. Richardson had declined to act as trustee (R., p. 8), and its prayer was that Drury might be enjoined from paying out of the estate any money for dues, taxes or other charges to the State of Massachusetts.

Mr. Drury answered the amended bill, neither admitting nor denying the allegations as to the last domicile of the testator, conceding that he had the entire custody and management of the assets and personal securities; stating that he was willing to "account in this honorable court, or in any other jurisdiction in that behalf," for all moneys and property received by him as executor and trustee, and that, as Mr. Richardson had declined to act as trustee, he was willing that some fit and proper trustee should be appointed in the latter's stead.

On April 1, 1899, a decree was passed in the cause (Rec., p. 16), appointing Samuel A. Drury and Samuel Maddox trustees to perform the trusts created by the will, "authorized and empowered to receive from the executors named in said will all of the property whereof the deceased died seized and possessed," upon giving bond in the penal sum

of $25,000 each for the faithful discharge of their duties as trustees.

It will be noted that, although this decree (see record, pp. 16-17) contained a recital that it "appeared to the court that the late William A. Richardson was last domiciled in the District of Columbia," etc., it not only did not assume to vacate, or to attack, the administration proceedings in the Massachusetts courts, but, on the contrary, appointed "trustees," only, whom it authorized and empowered to receive "from the *executors*" the assets of the decedent. There was never administration in any other tribunal than the probate court of Massachusetts, the will was never admitted to probate anywhere else, and the title both of the trustees and of the beneficiaries, from that time to this, has rested upon the Massachusetts probate. It is, of course, further to be noted that, had the Supreme Court of the District of Columbia undertaken, in terms, to attack or annul the administration proceedings in Massachusetts, it could have no jurisdiction or power to render any decree which would affect the jurisdiction of the Massachusetts court in that regard, nor the duties or the accountability of the executors to the court of their appointment.

Under the Massachusetts statutes, the jurisdiction assumed by the court, so far as it depended upon the place of residence, could not be contested except by an appeal in the original case, or where the want of jurisdiction appeared on the record. Dallinger vs. Richardson, 176 Mass., 81. The jurisdiction is conclusively presumed, in that jurisdiction, in any proceeding involving the validity of any order or decree of the court or any proceedings thereunder, and the executors could not deny the validity of their appointment as executors.

It is apparent, therefore, that neither the proceedings which actually took place in the Supreme Court of the

District of Columbia, nor any which could have taken place there, relieved the executors from their duty of accounting to the Massachusetts court for the assets which came into their hands as executors, under their appointment by it. They accordingly rendered such an account (Rec., pp. 88-91), which account was examined and considered by the Massachusetts court, and by it allowed (Rec., p. 89), on the 25th day of April, 1899 (Rec., p. 89).

On the 18th of October, 1899, an order was passed by the Supreme Court of the District of Columbia (Rec., p. 17), referring the cause to the auditor to ascertain and report the amount and character of the estate of which the late William A. Richardson died seized and to "state the account of the executors and trustees under the will of the said deceased."

If by this order it was intended to require *the executors*, who were George F. Richardson and Samuel A. Drury, to account, in this jurisdiction, for their administration of the estate as executors, so much of the order as contemplated such an accounting was necessarily void. In the first place, the court at no time acquired jurisdiction over Mr. Richardson, one of the executors, and, in the second place, it is well and conclusively settled, at least in the Federal courts, that executors are accountable only in the jurisdiction of their appointment. Vaughn vs. Northrup, 15 Pet., 1; Lewis vs. Parrish, 115 Fed., 285; Courtney vs. Pradt, 135 Fed., 218; S. C., 160 Fed., 561; Jones vs. Herbert, 2 D. C. App., 485, 496.

The auditor, accordingly, in his report filed December 19, 1900, stated the account of Maddox and Drury, trsutees, charging them with the "personal estate received from the executors" and with the moneys received by them subsequently, and crediting them with their disbursements. This account was approved in due course by the Supreme Court

of the District of Columbia, and was followed by five other successive references to the auditor and accountings by the trustees, for the several successive periods of their administration as trustees covered thereby. Alexander R. Magruder, one of the beneficiaries, became of age on January 17, 1904, and Isabel R. Magruder, the remaining beneficiary, attained her majority on the 28th day of April, 1907, neither of whom, by petition for review or application to the court of whatsoever kind, has questioned the propriety of the action of the auditor, in his said first report, in commencing the account of the trustees with their entrance upon the trust, and charging them, accordingly, with the assets received by them from the executors, pursuant to the decree of their appointment.

At page 72 of the appellants' brief, it is objected that, while the account of the executors, submitted to and allowed by the Massachusetts court, accounts for the *receipts* from the testator's real estate, it does not account for the real estate itself. Since it is nowhere pretended that the executors disposed of any of the real estate in question, it is difficult to see what they had to account for in respect to it other than the receipts from it. It further appears, at page 25 of the record, that three parcels of the real estate enumerated in the executors' inventory (Rec., p. 85) going to make up the $39,800 of realty referred to in the brief, did not belong to the testator at all, but to the Eliza C. Magruder estate, of which he was trustee (see *infra*, p. 58).

It remains, by way of further statement of the case for present purposes, to inquire concerning the object of the orders of reference under which the last auditor's report was made, and the extent of his authority thereunder. These orders were two, namely: One of January 15, 1909, —"Ordered that this cause be, and it hereby is, referred to the auditor *to state the account of the trustees herein* as of

date January 17, 1909" (Rec., p. 27); and, the then auditor, James G. Payne, Esq., having in the meantime deceased, the further order of February 3, 1910 (Rec., p. 37), reciting his death and referring the cause to the auditor "to state *the final account of the trustees and the distribution of the trust estate in their hands*, and report such commission or compensation to the trustees as may be appropriate and proper," etc.

Both these orders of reference are, further, to be read in the light of the decree of July 9, 1909 (Rec., pp. 33-37), and of the proceedings which led to that decree.

These proceedings were, a petition filed by the two beneficiaries, the appellants, on June 16, 1909, the younger of them being more than two years past her majority, reciting the appointment in the case, on April 1, 1899, of Drury and Maddox as trustees, with authority "to receive from the executors named in said will" all of the property of the testator; the order of the Massachusetts court commanding them to pay over the trust funds to the said Drury and Maddox; the filing by the executors in the Massachusetts probate court of their first and final account and the approval thereof by the court, a copy of the inventory and of the said account of the executors showing the property received and receipted for by them as trustees being made an exhibit to the petition; that the trustees thereupon had taken into their possession the property and funds so received by them from the executors; the appointment of Alexander R. Magruder as an additional co-trustee by the order of the court of April 18, 1906, the fact that he had had no active participation in the management of the estate or the execution of the trusts; the filing and passing of the successive accounts of the trustees; the fact that Alexander Richardson Magruder was, under the will, entitled to receive the whole of his

share of the estate, being beyond the age of 26; that Isabel R. Magruder, being beyond the age of 23 years, was entitled to receive one-fourth of the same, her remaining one-fourth to be held in trust until she should become 26 years of age; that a division of the assets into two equal parts, set out and described in Magruder Exhibit "C" and Magruder Exhibit "D," had been made; that Maddox and Drury were desirous of surrendering their trust, and that the American Security & Trust Co. had been accordingly selected as the trustee in their stead to hold the one-fourth of the estate which Isabel R. Magruder would not become entitled to receive until she was 26 years of age, followed by prayers that the trustees might transfer to Alexander R. Magruder his share of the estate, to Isabel R. Magruder the one-fourth of the estate which she was then entitled to receive, and that the American Security & Trust Co. might be appointed trustee in the place and stead of the then trustees with respect to the remaining undistributed one-fourth of the estate, etc., etc.

This petition was followed by the decree of July 9, 1909 (Rec., pp. 33-37), in effect directing that distribution be made as prayed, and concluding with paragraph "Fifth" (Rec., pp. 36-37), stating that the trustees had received and were in possession, as of January 17, 1909, of the proceeds of certain notes, aggregating $11,187.78, directing that these proceeds be not distributed according to the agreed plan of division, but be retained until settlement of the trustees' accounts and the ascertainment of the amounts found to be due and payable to them for compensation, commissions and the costs of court, etc., the fund in their hands to be chargeable with such compensation and costs, any residue to be divided in accordance with Magruder Exhibit "D," the court retaining jurisdiction of the cause for the purpose of ascertaining the compensation due to the

trustees, respectively, the costs, and the property, if any, belonging to the estate remaining in their possession, as also, in respect to the undistributed one-fourth share of the petitioner, Isabel R. Magruder, etc.

Viewed in the light of this petition and decree, the object and purpose of the order of January 15, 1909, and of the supplementary order of February 3, 1910, made necessary by the death of the former auditor, are too obvious to require comment. The petition upon which they were based did not seek, and the orders of reference passed pursuant to it did not impose upon the auditor the duty, nor the slightest semblance of authority, to reopen the five successive audits which had already been had in the case, all of them ratified by the court, acquiesced in by the parties, and remaining unchallenged in the pleadings, by the petition, or otherwise, or to review, reverse or annul the action of the Massachusetts court, dealing with its own officers, and in like manner unassailed or attacked in the pleadings or elsewhere in the record.

To the report of the auditor under this reference (Rec., pp. 38-47), fourteen exceptions (Rec., pp. 129-131) were presented on behalf of Alexander R. Magruder and Isabel R. Magruder, the most intelligible and convenient method of considering which objections, it is believed, is the order in which they were made and are presented in the record, though a somewhat different arrangement is followed in appellants' brief. They may be summarized as follows:

I. To the allowance to the trustees of a commission of five per centum on that part of the principal upon which they have as yet received no commissions, and of ten per cent upon the income (Exceptions 1, 11).

II. To the allowance of a commission upon the principal estate *received* by the trustees, instead of upon the net

amount of the estate delivered by them to the beneficiaries (Exceptions 2, 3).

III. The failure of the auditor to consider, for the purpose of determining the compensation to which the trustees were entitled, the commission allowed Mr. Drury by the Massachusetts probate court for his services as executor (Exceptions 4, 5).

IV. The refusal of the auditor to charge the trustees with the alleged profits made by the firm of Arms and Drury, of which the trustee Drury was a member, in connection with certain real estate mortgages, which mortgages the trustees purchased from Arms and Drury as an investment of the trust funds (Exceptions 6, 7, 8, 9).

V. The refusal of the auditor to allow commissions or compensation to Alexander R. Magruder as one of the trustees under the will (Exception 10).

VI. An alleged inconsistency of the auditor, in holding that he was without authority to reopen or reform the first account of the trustees, as reported by his predecessor and approved by the court, and yet finding that a tacit understanding had been arrived at by counsel that the account should be reopened, followed by an examination of it by him for certain purposes (Exception 12).

VII. The refusal or failure of the auditor to state an account by the trustees of the entire estate of the testator, including the account of the executors, under the Massachusetts administration, of which executors Mr. Drury was one (Exception 13).

VIII. To the charging of the auditor's fee against the cash in the hands of the trustees (Exception 14).

The cause came before the court of first instance for final decree upon these exceptions only, and the case is here upon appeal from the action of the Court of Appeals in sustaining the action of the court below in overruling them.

It follows that only the questions raised by these exceptions were before either of the lower courts, or can be considered here.

I-II.

The first objection is to a five per cent commission on the principal of the estate and a ten per cent commission on the income, while the second objection is to the allowance of the commission upon the principal estate received and administered by the trustees, instead of upon the net amount or value of the estate delivered by them to the beneficiaries.

These objections constitute point No. 5 of appellants' brief, considered at pp. 95-110, where it is contended that the allowance was excessive and, further, that no compensation whatever should be allowed because of an alleged maladministration by the trustees of their trust.

The character and extent of the services are shown in the auditor's report (Rec., pp. 44-46). As is shown by the report and schedule of the trustees accompanying the auditor's report (Rec., pp. 96-128), the personal estate of the testator consisted in large part of doubtful, second trust promissory notes, more than three thousand in number. During the period covered by the first report of the auditor, there were 849 separate payments of principal and 937 separate payments of interest; during the period of the auditor's second report, there were 428 payments of principal and 1,105 payments of interest; during the period covered by the third report of the auditor, there were 360 payments of principal and 716 payments of interest, etc., etc., the number of payments being reduced in the successive accountings by the fact that the trustees, as they realized upon these doubtful, second trust securities, invested their proceeds in good, first mortgage interest-bearing notes, without the loss of a dollar during their entire administration. In addition, they were compelled to buy in,

under the second trusts, some forty different pieces of "contract-built houses;" to keep them in repair, see after the rents, etc., etc. Measured by the amount of labor involved, as the auditor stated in his first report, a compensation of ten per centum upon income was inadequate (Rec., p. 19); and, it is submitted, the same is unquestionably true of a commission of five per centum upon the principal, collected in such a manner, and under such responsibilities.

2. In the second place, the rate of compensation in question, allowed by the auditor and approved by the court in each of the five preceding accounts of the trustees, is, in effect, a rate of compensation established in the case. It has been approved, in the present proceeding, by both the auditors, the Supreme Court of the District of Columbia, and the Court of Appeals of the District of Columbia. Nothing is offered to show that it was excessive in the preceding accountings, nor that it is so now.

3. In the third place, the rate in question, namely, ten per centum upon income and five per centum upon principal, was declared by this court to be a proper allowance as far back as Barney vs. Saunders, 16 How., 535, 541-2, a case going up from this District, and which has ever since been followed in proper cases, uniformly it is believed, in this jurisdiction, as seems to be recognized at page 57 of appellants' brief. If, as there stated, the maximum commission permitted, the auditor, the Supreme Court of the District of Columbia and the Court of Appeals have united in holding it to be a proper allowance in this case, and we submit were abundantly justified by the facts of the case in doing so.

With respect to the second objection, there are two answers, each of which is conclusive.

1. In the first place, there is no competent evidence in the case to show that there is the alleged difference, or any

substantial difference, between the amount received by the trustees, and the amount turned over by them for the beneficiaries at the conclusion of their trust. The assumption that there has been a shrinkage is based upon a valuation of the real estate, made extrajudicially, for the purposes of division merely, by certain friends of the parties. Inasmuch as, with the exception of a country home purchased by the trustees for the beneficiaries upon the application to the court and with the consent of all concerned, no real estate was acquired by them except certain lots purchased at foreclosure sales under the second trust notes, held by the testator at the time of his death, it is difficult to see upon what theory the alleged shrinkage in real estate values, if any has really occurred, should be charged against the trustees, or made the basis of a reduction in their compensation.

2. With respect to the second objection, its theory amounts to this: If the assets of an estate are $300,000, and its liabilities are $150,000, the trustees, though charged with the management of and responsibility for the entire $300,000, are entitled to compensation upon the net balance only, remaining after the obligations are discharged. If the liabilities exceed, or equal, the assets, they should receive nothing.

Alleged Maladministration as a Bar to Compensation.

A further objection to the compensation allowed is made under the fifth heading, at p. 101, *et seq.*, of the brief for appellants, that the trustees should be denied all compensation because of an alleged maladiministration of their trust.

It is in the first place to be noted in respect to this objection, that it nowhere appears in the record. The petition

of appellants (Rec., pp. 27-32), under which the final audit and other proceedings out of which the present appeal arises were had, though setting out the appointment of appellees as trustees in the cause, the statement by the executors of their account in the Massachusetts Probate Court and its approval of the same, accompanied by copies of both the inventory and of the final account of the executors, the petition expressly referring to the receipt of the trustees attached to that account as showing what property came into their hands as trustees (Rec., p. 28), that the appellees had from time to time submitted five successive accounts of their administration and that each of these reports had been passed by the auditor, makes no suggestion of maladministration, negligence, fault or default upon the part of the trustees, of any kind or character. This cause came before the court of first instance, and before the Court of Appeals, only upon certain exceptions to the sixth and final account of the trustees as reported by the auditor as above noted (and see opinion of the Court of Appeals, Rec., p. 54); which exceptions, though objecting to the rate of commissions allowed, point to no maladministration on the part of the trustees nor in any way indicate a contention that they have been guilty of conduct forfeiting their right to compensation, as it was necessary for them to do in order to raise a contention of that character. If appellants proposed to contend that the auditor erred in holding the trustees entitled to any compensation, that contention should have been brought directly to the view of the court in the form of the exception itself, exceptions to such reports being in the nature of special demurrers, requiring the particular error relied upon to be pointed out, without which they will not be considered. Dexter vs. Arnold, 2 Sum., 108; Story vs. Livingston, 13 Pet., 359, 366; Green vs. Bishop, 1 Cliff., 186, 191; R. R. Co. vs. Gordon, 151

U. S., 285, 290; Richardson vs. Van Auken, 5 D. C. App., 209.

In the second place, no such question was made below. As shown by the opinion of the Court of Appeals (Rec., p. 158; Magruder vs. Drury, 37 App. D. C., 519, 537), the exceptions relied on in that Court related (1) to the allowance of the 5 per cent commission on principal and 10 per cent on income, (2) to the $18,800 item allowed by the Massachusetts Court, and (3) to alleged profits made by the trustees in the purchase of notes for investment—namely, an alleged profit realized by one of the trustees, Mr. Drury, from the fact that the trustees, when in funds for which it was their duty to find investments, bought mortgage notes from the real estate firm of Arms and Drury, of which Mr. Drury was a member. Only the last of these propositions, as is apparent upon their face, could by any possiblity raise any question as to the due and proper administration of the trusts, the facts and circumstances relating to which objection, treated as though it had been raised below and therefore were properly before this court, are set out in the auditor's report at pp. 41-2 of the Record, are considered at pp. 163-4 in the opinion of the Court of Appeals, and *infra*, at pp. 15-20. The present suggestion is that the contention of the appellants before the auditor (Rec., p. 41) and in their exceptions (Rec., p. 130, Exceptions 6, 7, 8, 9), was, not that the purchase by the trustees of promissory notes from Arms & Drury was maladministration, because of which they should be denied compensation for their services, but that Drury's share of the assumed profits of Arms & Drury in the sale of these notes should be considered in arriving at a reasonable allowance to the trustees (Rec., p. 41), or (Rec., p. 163) that they should be charged with Drury's share of these assumed profits. The contention now made, even if other-

wise tenable, namely, that the purchase of the notes from Drury's firm was maladministration, of a character to defeat the allowance of any compensation to the trustees, can not be entertained here because not raised by the exceptions to the auditor's report, which exceptions presented the sole questions for consideration below, and because raised by the appellants for the first time in this, the appellate court of last resort.

If, notwithstanding the foregoing, it can be necessary to consider in this court questions not raised by the pleadings, contained elsewhere in the record, nor presented to the court below, it will facilitate their consideration to gather from the appellants' brief, where alone they appear, the charges of maladministration preferred, and to ascertain to what extent, if at all, they find support in the record.

These charges are (a) That the appellee Drury made a profit from the purchase by the trustees, for investment, of securities from Mr. Drury's firm, Arms & Drury; (b) That, in the Massachusetts proceeding, Drury as executor accounted to himself and Maddox as trustees, "to the personal profit of both" (Appellants' Brief, p. 102)—which accounting allotted to Drury "$18,800 to be divided" (81); (c) That, in the performance of his duties as trustee, Mr. Maddox, as admitted by him, was more concerned for his friend, appellants' father, than he was for their interests (pp. 23, 102); (d) That the entire situation was one created, not by the will, but by the co-operation of the appellees and of the guardian of the appellants, their father, to control and use the trust estate (102); (e) That, because Drury made no accounting of his executorship from the time of his appointment in October, 1896, to April, 1899, he has "small claim on a court of equity for compensation in any shape or to any amount" (103);

(f) That Drury and Maddox, the trustees, and the friend of the latter, who was guardian for the appellants, allowed Drury $14,600 for his services, paid by him from his right hand into his left, with the understanding that Mr. Maddox was to have a share of it (103-4); (g) That Mr. Maddox either intentionally betrayed his trust and deceived the Massachusetts court by the designation as expense of a concealed compensation, or was guilty of reckless disregard of his duties (104); (h) That the reliance of Mr. Maddox on Mr. Weir, who represented the Executors and received $1,000 as an allowance to himself, increased the responsibility of the former (104); (i) That Mr. Drury made no report, to any court, of his transactions by way of purchase, management and sale of real estate between the death of the testator and April 1899 (104); (j) That Mr. Maddox, counsel for the infant beneficiaries, was content merely to obtain control of the estate by transfer of its administration here and his own appointment, whereupon all adversary interest vanished (104), which infidelity in the inception of the trusteeship is wholly inconsistent with a claim of the trustees for compensation (106), and (k) That the trustees were content to receive from Mr. Drury as executor about $100,000 less than the reported assets of the estate, of which diminution about $14,600 was paid to Mr. Drury (105).

This arraignment, it must be confessed, is a serious one, and reflects severely either upon the parties charged, or the parties making the charges, accordingly as the record does or does not show justification, or some excuse, for them in the facts or testimony.

(a) The first of these charges, that the trustees purchased from the firm of Arms & Drury certain first mortgage notes, by reason of which purchase Mr. Drury realized

some profit, is, as stated, the only one of them preferred in the record or at the hearings below, and, as also pointed out, it was then urged only as a basis of accountability by the trustees, or by Mr. Drury, to the estate for the supposed profit thus gained. Some distortion of the facts in regard to the acquisition by Arms & Drury of these notes appears at p. 87 of the brief, in the statement that "Mr. Drury's business was the buying of such notes at what he and a vendor considered them worth, and selling them at what he and a purchaser thought them worth;" that he realized no profit until he found a purchaser who thought them worth more than he paid for them, etc., etc., in apparent attempt to place Mr. Drury, or his firm, in the attitude of note speculators, purchasing the notes at whatever price they could get them and depending for their profit upon selling them to a purchaser at whatever higher figure might be obtainable. The undisputed, indisputable fact is that Arms & Drury were real estate brokers who negotiated loans to borrowers upon real estate security, consisting largely of what are known as building loans, and charging for their services the usual broker's commission of from one to two per cent, usually one per cent (Rec., pp. 63, 68, 71-2, 58), which commission was paid by the borrowers to whom Arms & Drury made the loans (Rec., p. 74). When the trustees, from the proceeds of the small second trust notes which comprised the bulk of the testator's estate at the time of his death, had accumulated a sufficient fund for investment in first mortgages, they purchased a considerable number of these promissory notes from Arms & Drury, in the case of building loans after the buildings had been completed (Rec., pp. 54-5) and the investment had thereby become secure from contingencies. That the margins were safe and the investments good is shown by the fact that, in every instance the trustees realized the full amount

called for by the notes, principal and interest (Rec., p. 55). None of the loans were made out of funds belonging to the Richardson estate (67), nor was there any profit to Arms & Drury from the sale of the notes, their only profit being the small commission above stated, paid by the borrower to the firm for negotiating the loans at the time they were made (Rec., pp. 66, 74-5). As pointed out by the auditor, no charge of malfeasance or misfeasance was made against the trustees in this connection at the hearing before him (42); and he further found (*ib.*) that these transactions of the trustees with the firm of Arms & Drury "benefited the estate by enabling the trustees at all times to make immediate reinvestment of its funds, without loss of income."

> "It is clear that the notes were bought at their face and actual value, that no profit was made by the trustees, and that not a dollar was lost to the estate. Drury knew the character of the notes, and there was less trouble and expense in the investigation of titles than there would have been in the purchase of similar securities from others; nor does it appear that like securities could have been readily obtained from others. The other trustee, Maddox, had no connection with the partnership of Arms & Drury. He was entirely disinterested, and there is no complaint against him other than that he concurred in the purchase of the securities. * * * Dealings with the partnership of Arms & Drury by trustees, one of whom was a member of the partnership, call for the closest scrutiny of each and every such transaction; but when that scrutiny has disclosed no actual wrongdoing, no advantage taken of the situation, no profits made and no possible injury to the interests of the beneficiary, there is nothing calling for restoration by the supervising court. A pecuniary charge, therefore, in the settlement of the account, would, under such circum-

stances, not be a restoration, but could be inflicted only by way of fine and punishment."

Magruder vs. Drury, 37 App. D. C., 519, 545-546; Rec., 163-4.

It is further to be observed, as with so many of the objections sought to be urged in this court, that this claim of maladministration, rendering it error to allow any compensation to the trustees, because of this alleged indirect profit to Mr. Drury in the purchase of securities from his firm, was not made below. There the claim was, only, that the profit in question should be considered in determining the amount of the compensation to be allowed.

"The Auditor: The proposition is that one trustee has received compensation in connection with handling these investments, and that that should be taken into the account.

"Mr. Wilson: That is all." (Rec., p. 67.)

(b) The second charge of malpractice is (Appellants' Brief, p. 102), that "Mr. Drury as executor accounted to himself and Mr. Maddox as trustees, to the personal profit of them both," and that (81) they, in the absence of Mr. Richardson, the other executor, "allotted this $18,800, to be divided."

The undisputed facts in this regard are that, the testator in his will having (Rec., pp. 9-10) described himself as an inhabitant of Cambridge, in the County of Middlesex, Massachusetts, and as having property in that county, and his brother, George F. Richardson, Esq., one of the executors and a resident of Massachusetts, representing to his co-executor that the testator had expressed a desire that his estate should be administered in Massachusetts, the will was offered for and admitted to probate there and letters testa-

mentary issued to them by the Probate Court of Middlesex County. Some two years later, the taxing authorities of that county undertook to levy and collect an annual tax of $7,500, aggregating about $15,000 for the two years, upon the assets of the estate, whereupon the appellants, then infants, by their father, their guardian and appearing as their next friend, filed their original bill of complaint, alleging that the domicile of the testator, notwithstanding the recital of the will, was in the District of Columbia, where all of his property was except one or two parcels of unproductive real estate of trifling value in Massachusetts, that George F. Richardson, one of the executors, as the plaintiffs were informed, had filed his resignation as executor and trustee under the will in the Middlesex Probate Court, that the plaintiffs, their mother the life tenant being then deceased, would be subjected to inheritance and other taxes and dues in Massachusetts unless protected in their rights, and the bill accordingly prayed that an account should be taken of the assets received by the executors, who were the defendants to the action, that they should be required to file accounts from time to time showing what moneys they received and the disposition thereof, and that, if the plaintiffs were correctly informed that the defendant George F. Richardson had resigned as executor and trustee under the will, some fit and proper person might be appointed in his stead, and for general relief. Mr. Richardson being beyond the reach of personal service and declining to submit himself to the jurisdiction of the District of Columbia Courts, the bill was amended by making Mr. Drury the sole defendant, with similar prayers for relief, the present appellee, Mr. Maddox, being the attorney for the plaintiffs in these proceedings. Mr. Drury answered, neither denying nor admitting the allegation as to the testator's domicile,

consenting, for himself, to account in the Supreme Court of the District, or in any other court having jurisdiction in that behalf, for all moneys and property received by him as executor and trustee, to further account from time to time as might be necessary, and consenting that, if his co-executor and trustee George F. Richardson should decline to act *as trustee,* some proper person might be appointed to act as such trustee with him in the place and stead of said George F. Richardson. This was followed by the order of April 1, 1899, appearing at pp. 16-17 of the record, reciting that it appeared to the court that the testator's last domicile was in the District, and that the infant complainants lived there, and thereupon appointing Samuel A. Drury and Samuel Maddox "trustees to perform the trusts created in and by said will, and authorized and empowered to receive from the executors named in said will all the property whereof the said deceased died seized and possessed," upon giving bond in the sum of $25,000 each, "conditioned for the faithful discharge of their duties as such trustees." Although the order is not copied into the record, it appears from the testimony of Mr. Maddox (Rec., p. 77) that there was, also, an order enjoining the executors from paying the tax sought to be collected from them by the Massachusetts authorities.

As will appear upon inspection of this order of April 1, 1899, it appointed Messrs. Drury and Maddox to be trustees, only, not executors, and with authority and power "to receive from the executors named in said will" all the property of the estate. Under the laws of the District, as declared by the Court of Appeals in its opinion (Rec., p. 162), "the Equity Court had no jurisdiction to probate a will and to establish and enforce one as to personalty. Whatever may be the latitude of the rights and powers of

executors of unprobated wills by the rules of the common law, or whatever may be the limitations thereof resulting from our probate statutes, it is quite certain that they had no power to administer a trust of personal property created by will, without its probate in due form. As there was no probate in the District, the authority of the executors necessarily rested in the probate and letters testamentary of the Massachusetts court." "No offer was ever made to probate the will in the District of Columbia, which was necessary to confer power on the executors to administer the estate therein. The only source of their authority was the order of the Massachusetts court admitting the will to probate and issuing the letters testamentary which they received." (Rec., p. 160.)

Upon the foregoing state of facts and of the law, it would seem too plain for controversy, except for the contentions of the opposing brief, that the result of the proceedings in the District of Columbia was to leave the probate of the will in Massachusetts and the administration of the estate there by Messrs. Richardson and Drury, *qua* executors, unattacked and undisturbed; and that the court here, in appointing Messrs. Drury and Maddox "trustees to perform the trusts created in and by said will," which trusts it was, as per the above quotation from the opinion of the Court of Appeals, without power to administer otherwise than after probate of the will in due form, contemplated and had power to authorize only a taking over by them from the executors of such property as should be left in the hands of the latter for the purpose of the trusts, after its due administration by them as executors.

The contention as to this point by the appellants is based upon the order of the Middlesex Probate Court of April 11, 1899, which decreed that "George F. Richardson and Samuel A. Drury, executors as aforesaid, be and hereby

are authorized and directed to pay over the said trust funds to the said Samuel Maddox and Samuel A. Drury, trustees as aforesaid," and the contention that, since the trust funds and property were already in the possession of Mr. Drury, no further act of transfer was requisite at that time (Appellants' Brief, pp. 14-15). Stress is further laid upon the following clause in this order, as indicating that its object was to relegate the entire matter, the accounting of the administration of the estate by the executors included, to the District courts: "It further appearing to the satisfaction of the court that the laws of the District of Columbia secure the due performance of said trust, and it being deemed just and expedient so to do." With respect to these claims, it is to be noted, first, that it was the "due performance *of said trust*" which the Massachusetts court had been satisfied was secured by the laws of the District of Columbia, and that it was "the *said trust funds*," only, which the executors were authorized to transfer to the trustees. As pointed out, *supra*, the District Equity Court, which appointed Drury and Maddox trustees, was without power to probate a will, to establish or enforce one as to personality, or to administer a trust of personal property created by a will, without its probate in due form, nor is there the slightest indication in the record of the proceedings in either of the courts that either of them contemplated that the administration of the estate by the executors, which could be only in a probate court, should hang in mid-air, granted but not closed in the Massachusetts Probate Court, and then transferred to the Equity Court of the District of Columbia, which was without jurisdiction over the trusts created by the will until after completion of the administration of the estate in the probate court, there being no probate of the will in the District of Columbia, and the probate being "necessary to confer power on the executors

to administer the estate therein" (Rec., p. 160). That the Massachusetts Probate Court did not regard its order of April 11th as terminating proceedings in that court, or as relieving the executors commissioned by it to administer the estate from the duty of accounting to it, the court of their appointment, for their administration, is shown by the fact that it received, examined and considered their account, submitted by them to it for that purpose, and decreed its allowance (Rec., p. 89), that account charging them with the assets of the estate as inventoried in that court, crediting them with their disbursements down to the date of its approval, and leaving a net balance in their hands for transfer to the trustees, itemized in the last eight items of the account, which net balance was receipted for by the trustees as the property which they were authorized and empowered to receive from the executors by the order of the Supreme Court of the District of Columbia of April 1, 1899, and the order of the Massachusetts Probate Court of April 11th, above referred to.

It was in this account of the executors, so approved by the court of their appointment after examination and consideration by it, that the allowance to the trustees of $18,800 now under consideration was contained. As appears in the record (p. 88), under ther ules of the Massachusetts Probate Court, compensation in the form of commissions is not allowed executors there, but in lieu thereof the court allows such compensation for services and expenses as in each case it may deem to be just and reasonable.

It is objected that the allowance claimed in the executors' account does not comply with the terms of this rule, in that the word "compensation" does not appear in it, the item being (Rec., p. 90) as follows: "Expense of administration, including care of property, the payment of debts,

the making of final account, the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about $50,000 for repairs on real estate, the taking up of prior mortgages, taxes, etc., including also the payments of moneys to Isabel Magruder and to Alexander F. Magruder, the guardian of their minor children, counsel fees incurred in the defense of suits for taxes in Massachusetts and for counsel fees in Washington, etc., $18,800." On the contrary, we submit that, while the *word* "compensation" does not appear in the item, the enumeration of the services performed by the exectuors as the basis for the allowance claimed readily and plainly conveyed, to the apprehension of ordinary intelligence, that it was compensation to the executors for the services thus enumerated, and not their expenditures in the performance thereof, which was the basis of the allowance asked;—for example, the sum claimed, $18,800, could not have been claimed as a credit to the executors for the $50,000 expended by them in repairs, the $17,400 paid to Mrs. Magruder during her lifetime, the $8,200 paid to the guardian of her children, the $49,705.31 expended in repairs, taxes, prior mortgages on the real estate, and the like.

It is, further, the undisputed fact in the record that neither Mr. Drury (Rec., p. 60) nor Mr. Maddox (Rec., p. 75) had anything to do with either the formulation of this item nor with its amount, further than to submit the matter to the judgment and follow the advice of Mr. Weir, the Massachusetts lawyer, by whom the account was prepared, and who advised them that the amount claimed probably would be allowed by the Massachusetts court in a case of this character, followed by the submission of the account, the item in question included, to Mr. Richardson,

the co-executor, a Massachusetts lawyer of eminence and distinction, whose high sense of honor and whose absolute disinterestedness is shown by the fact that, although the allowance was to both executors, he assigned the whole of it, less the expenses which were to be paid out of it, to his co-executor Mr. Drury, because all the services had been rendered by the latter, and Mr. Richardson, although legally entitled, was unwilling to accept compensation for services which he himself had not in fact rendered; the approval of these two Massachusetts lawyers being followed, further, by the submission of the account, the now disputed item included, to the examination, consideration and approval of the judge of the Massachusetts Probate Court, by whom it was allowed. So far from Mr. Richardson having resigned from the executorship, as alleged in the bill of the appellants in the Equity Court, accompanied by no attempt at proof, the record shows that in this, the concluding act of the executorship, he participated, signing and making affidavit to the final account as rendered, the disputed item included, as "just and true" (Rec., p. 91).

Out of the allowance, the executors were charged with the duty of paying all the expenses of administration, including the compensation of counsel in resisting the attempted taxation of the assets of the estate in Massachusetts. The estate in its defense against the payment of this tax was represented as counsel by Mr. Maddox, Hon. William H. Moody, later an Associate Justice of this court, and Mr. Weir, a lawyer having offices with Mr. Richardson, one of the executors. The only foundation for that part of the charge now under consideration which represents that "Drury as executor accounted to himself and Maddox as trustees, to the personal profit of both" (Appellants' Brief, p. 102), and that the $18,800 allotted to Drury was "to be divided" (*ib.* p. 81), is the fact that

Messrs. Moody and Maddox were paid by Mr. Drury as executor, out of the $18,800 allowed him in part for that purpose, a fee of $3,000, which was shared equally between them. Such a charge, upon such a foundation, we submit is most unjustifiable.

Nor is it true, as claimed, that Drury as executor accounted to himself and Maddox as trustees. He accounted to the Massachusetts Probate Court, the court of his appointment, which duly approved the account. It is further argued, however, that the account, when submitted to the Massachusetts Probate Court, contained an endorsement on behalf of the plaintiffs by their father and guardian *ad litem*, and by Maddox and Drury as trustees; that the order of approval by the probate court was a mere formal order, based upon this consent, and certain authorities are cited to the effect that an *ex parte* approval of an account by a trustee or other fiduciary, where he himself is interested, is insufficient to bind infants concerned in the matter. There are several inaccuracies in this statement. In the first place, Alexander F. Magruder was the duly appointed guardian, not merely the guardian *ad litem*, of the appellants. In the second place, even if it were not to be assumed that the judge of the probate court possessed the legal knowledge, assuming it to be correct, which is displayed on behalf of the appellants in the statement that the rights of infants can not be concluded by the consent of parties representing them, and if the maxim *omnia rite acta praesumuntur* is not to be indulged in regard to that tribunal, its order, though reciting the consent of the parties, shows, affirmatively, that the court, itself, "examined and considered" the account, and thereupon allowed it (Rec., p. 89).

The learned counsel for the appellants would seem, moreover, to be in error in their conclusions as to the effect of a

consent decree, assented to on behalf of infant parties by their guardian and thereupon passed by the court. In Massachusetts, where the proceedings now under consideration were had, the Supreme Judicial Court, speaking by Chief Justice Gray, later one of the Justices of this court, held that a decree made upon consent of the guardian *ad litem* of an infant and the representation of counsel, and an adjudication of the court that it was a decree fit and proper to be made, is binding upon the infant. Walsh vs. Walsh, 116 Mass., 377. To like effect is the case of Thompson vs. Maxwell, 95 U. S., 391, 398, in which a consent decree, the infant parties to the cause being represented by their guardian *ad litem*, it was held could not be impeached except for fraud. The authorities generally, it is believed, are to the same effect.

(c) The third charge of maladministration is that Mr. Maddox, as admitted by himself, was more concerned for his friend the appellants' father than he was for the interests of Alexander Magruder, his *cestui que trust* (Appellants' Brief, pp. 23, 102). The sole foundation for this charge is the following: Dr. A. F. Magruder, father of the appellants, had at the instance of the testator conveyed property which was his own inheritance to the latter in trust for his sister Eliza C. Magruder for her life, with remainder to the appellants, this trust having been created when Dr. Magruder was ill and supposed to be at the point of death (Rec., pp. 82, 21-22). After the appellant Alexander R. Magruder had attained his majority, Mr. Maddox suggested to him the propriety of conveying to his father a life estate in what is known as the Araby Farm, which had been purchased by the trustees at a cost of $15,500, which suggestion the son refused to accept. It was only in regard to this suggestion (Rec., p. 82), in no way con-

nected with the administration of the trusts by himself and Mr. Drury, that Mr. Maddox was asked on cross-examination whether the son had not charged him with being more concerned with the father's interests than in those of the son, and Mr. Maddox replied, as was entirely apparent from the suggestion itself, in the affirmative, the suggested provision by the son of a home for the father for the period of the latter's life, under and because of the circumstances stated, being obviously intended for the father's benefit. It is upon this foundation, solely, that the charge is made, for the first time in this court, that in the administration of the trusts Mr. Maddox was guilty of maladministration in that he was "more concerned for the interest of his friend, the father of the appellants, than for their interests."

(d) The fourth charge of maladministration is that the entire situation under which the allowance of the $18,800 was made "was the creation, not of the testator's will, but of the co-operation of Messrs. Maddox and Drury, and the guardian, to control and use the trust estate" (Appellant's Brief, p. 102).

This charge, it must be confessed, seems inexplicable and amazing. The wholly undisputed testimony is that the bill and the amended bill in equity (Rec., pp. 1-9) were filed for the sole anl only purpose of protecting the estate from a large tax assessment sought to be made against it in Massachusetts, amounting to $7,500 per annum, equivalent to approximately three per centum upon its aggregate amount, and only about $1,000 less than the amount which has been annually available from it for the appellants' support (Rec., p. 45). The statement of the executors' account in the probate court, claimed here to have been brought about by the co-operation of Messrs. Maddox and Drury and the

appellants' father for the purpose of controlling and using the trust estate, was upon the advice of Mr. Moody (Rec., p. 75) in view of the fact that another Massachusetts tax year would begin in a few days, the account being settled April 25th and the new tax year beginning May 1st, with the result that, if the tax suit should be lost, another charge of $7,500 would be sucessfully asserted against the estate unless the assets were removed therefrom prior to the last named date. The charge by the appellants, in effect that the trustees and their own father conspired together to create a situation which resulted in the settlement of the executors' accounts and the allowance of the item under consideration, in order "to control and use the trust estate," indefensible as against any one of them, seems peculiarly so as against the father, who nowhere in the record is shown or claimed, however remotely, to have sought to use or control the trust estate in any manner whatsoever, or to have either sought or received any benefit to himself from it.

(e) The fifth charge of maladministration is that Mr. Drury made no accounting of his executorship from the time of his appointment in April, 1896, to April, 1899, and therefore has "small claim on a court of equity for compensation in any shape or in any amount" (Appellants' Brief, p. 103). The period in question, it will be noticed, is that during which he and his co-executor Mr. Richardson were administering the estate in their capacity as executors, and prior to his appointment as a trustee by the Equity Court. Throughout this period he kept books showing all the transactions concerning the business of the estate, all moneys received by the executors and all moneys paid out by them (Rec., pp. 58-59), and the account of himself and his co-executor, duly submitted to the court

of their appointment, was by it upon due examination and consideration found to be correct and approved. Upon these facts, wholly undisputed, in what does the maladministration consist? What color of justification or excuse can be found for the charge?

It is contended on behalf of the appellants, it is true, that under the decree of the Equity Court of October 18, 1899, the cause was referred to the auditor "to state the account of the executors and trustees under the will of the said deceased," with which the auditor, in his first report, complied in so far as to state the account from the time that the trustees were appointed in the equity cause, only, not attempting to state the account of the executors, properly so called, in their administration of the estate under the authority of the Massachusetts Probate Court, to which court they had already accounted. That report of the auditor was accepted and approved by the court which ordered the reference, and was followed by four other reports, similarly acted upon by the court prior to the sixth and last report, under which the present controversy arises. The reopening by the present auditor, under the last order of reference, of the report made by his predecessor ten years before, he held himself without authority to make under the orders of reference under which he was acting, even if the court below was vested with jurisdiction to vacate the decree of the Massachusetts court affirming the executors' account, or to require those executors, of one of whom the court below had never acquired jurisdiction, to restate their accounts in this District. The first report of the auditor was satisfactory to the parties then, and now, in so far as the record shows. It had not only been approved by the court, but acquiesced in by everybody, including the appellants after they had attained their majority and beyond the time allowed in equity for the filing of a bill of review. In

their petition for the distribution of the estate, as above pointed out, they recite, without criticism, objection or the suggestion of a desire for amendment, in any respect, the statement by the executors of their account in the Massachusetts court and its approval there, the receipt by the trustees of the assets which that accounting showed remained in the hands of the executors, after the allowance of the $18,800 to the latter, the auditor's first account, its approval, and the several successive accounts before the auditor, a copy of the inventory and account filed by the executors in the Massachusetts proceedings, the latter showing the $18,800 allowance, being filed with their petitions as exhibits "Magruder Exhibit A" and "Magruder Exhibit B" (Rec., p. 28), seemingly in contradiction of the allegation at page 67 of the brief, nowhere else alleged and nowhere attempted to be proved, that neither the appellants nor their present counsel knew of the circumstances of the settlement of the executors' account until the testimony was taken in the audit out of which the present appeal arises. Neither the reference to the late auditor, of January 15, 1909, nor the supplemental or amendatory order of February 3, 1910 (Rec., pp. 27, 37), authorized the auditor to reopen any former accounting, nor to state any account except that "of the trustees"—not of the executors. How, upon a state of the record such as this, was it possible for the auditor to do otherwise than to confine himself to the duties thus imposed upon him? And what possible basis is there in these orders of reference, or elsewhere in the record, for the claim of the brief, at page 62, that "it was his duty to ascertain and report any fact which was a bar to their final discharge"?

The *allegata* must be the basis for the *probata* (Boone vs. Chiles, 10 Pet., 171; Carneal vs. Banks, 10 Wheat., 181).

> "A party can no more succeed upon a case proved and not alleged, than upon a case alleged and not proved" (Foster vs. Goddard, 1 Black., 518).

The contention of the appellants is that, of his own motion, not only without anything in the order of reference justifying such action, but without any pleading, application or allegation anywhere in the record that such action was sought, the auditor should have decided that his predecessor, in his first report, had failed properly to comply with the then order of reference, that the court which ordered the reference had erred in approving that report, that the parties were not required to except, object or seek rectification, but that he, the present auditor, should have reopened the proceedings of the past ten years, and should have reviewed them in accordance with what he should conceive ought to have been done under the order of 1899, under the order of reference to himself, made in 1910, and which was incapable of affording any semblance of such authority.

It is further to be said that the exceptions to the last report of the auditor, after it had been completed and filed, were the first claim or intimation on the part of the appellants that the account of the executors should have been stated under the order of reference of 1899, or should be stated now. Not only is no such claim to be found in the pleadings, but it was not presented, even orally, before the auditor. As shown by his report (Rec., p. 39), the claim before him was, merely, that the allowance to Drury for his services as executor in the Massachusetts court should be considered in fixing the compensation of the trustees.

The record shows that, at a comparatively early stage in the last audit, the auditor gave notice that he held himself without authority to reopen prior accounts, confirmed by the court, without the specific direction of the court

(Rec., p. 39). Timely notice and opportunity were, therefore, afforded the appellants to have the order of reference broadened in this respect, if desired by them, and if the court should find it competent to do so. No such application was made. The auditor further held that, even if he possessed the power under the reference to reopen the former auditor's reports, the allowance by the Massachusetts courts could not be reviewed by the Supreme Court of the District of Columbia, which had no jurisdiction of the executors or of their accounts (Rec., p. 39), which view was sustained by the courts below (Rec., pp. 162-163, and see *infra*, p. 36).

The position taken by the appellants in the Court of Appeals, as stated in the opinion of that court, was that the Massachusetts Probate Court was without jurisdiction, the domicile of the testator at the time of his death having been in the District of Columbia (Rec., p. 159). This attitude upon their part is denied by the appellants in their brief here (p. 68). The controversy is immaterial for present purposes, since, in this court, "the appellants do not so contend. * * * The Court of Appeals treats the appellants' contentions as though the present were an attempt to impeach or refuse credit to the adjudication of the court of Massachusetts. Nothing could be further from the truth. Nothing that the Massachusetts court intended to do is sought to be undone by the appellants."

That the Massachusetts court did, after due examination and consideration, allow the executors for their expenses and for the services set forth in their final account submitted to that court the sum of $18,800, is incapable of dispute. This being so, the jurisdiction of that court to make that allowance being now conceded, and nothing which it intended to do being sought to be undone by the appellants, it is difficult to see what controversy can remain, in re-

spect to the item in the executors' account of $18,000 and the order of the Massachusetts court allowing it.

The jurisdiction of the Massachusetts court being thus unquestioned, certainly in this court, was there error in the view of the auditor, sustained by the lower courts, that, even if the reference to him were broad enough for the purpose of reopening the account of the executors, which had already been stated and approved by the Massachusetts Probate Court, an order directing such reopening was beyond the jurisdiction of the Equity Court of this District? In other words, independently of the question of the jurisdiction of the Federal courts to settle the accounts of executors appointed in a foreign jurisdiction (*supra*, 5), could the judgment of the Probate Court making the allowance in question be collaterally reviewed by an equity court, either in the District of Columbia, or in the State of Massachusetts itself? The contrary, even in the case of the Massachusetts equity courts, is established by the authorities there. Jennison vs. Hapgood, 7 Pick., 1; Paine vs. Stone, 10 Pick., 75; Abbott vs. Bradstreet, 85 Mass. (3 Allen), 587. The rule is the same elsewhere, it is believed without dissent. Goodrich vs. Thompson, 4 Day, 215; State vs. Roland, 23 Mo., 95; Iverson vs. Loberg, 26 Ill., 180; Commonwealth vs. Cain, 80 Ky., 318; Reynolds vs. Jackson, 31 N. J. Eq., 515.

(f) The sixth charge of maladministration is that Drury and Maddox, the trustees, and the friend of the latter, the father and guardian of the appellants, allowed Mr. Drury $14,600 for his services, paid by him "from his right hand into his left," and with the "understanding" that Mr. Maddox was to have a share of it (Brief, pp. 103-104).

The only foundation for this charge is that Messrs. Drury and Maddox, neither of whom knew the methods

under the Massachusetts practice for stating the claim of executors for compensation or the amount properly allowable under the practice there, left these matters in the first instance to Mr. Weir, a Massachusetts lawyer whose integrity and standing are not attempted to be impeached, to be followed by the submission of the account to and the concurrence in it by Mr. George F. Richardson, another Massachusetts lawyer of eminence and distinction, and its final examination, consideration and approval by the judge of the Massachusetts Probate Court. The charge that the allowance of the particular sum stated, $14,600, was made for Mr. Drury's services, rests upon the fact, not that either Mr. Drury, Mr. Maddox or the appellants' father fixed upon that sum, but that there was $14,600 left, for their compensation, of the allowance made by the court to the executors after paying the expenses of the litigation over the taxes and the other items embraced in the allowance, for which in part it was made; while the charge of an "understanding" that Mr. Maddox was to have a share of the allowance has no basis other than the fact that he and Mr. Moody were the attorneys for the executors in the Massachusetts litigation over the tax assessments, for the expenses of which litigation the allowance was in part made, and their fees for their services as ultimately paid were $1,500 each (*supra*, pp. 27-8).

(g) The seventh charge, that Mr. Maddox either intentionally betrayed his trust and deceived the Massachusetts court by the designation as expense of a concealed compensation, or was guilty of a reckless disregard of his duties in that connection (Brief, p. 104), has been sufficiently considered in connection with Charge *b* (*supra*, pp. 25-6). The word "compensation" is not used in the itemization connected with the allowance claimed and ap-

proved by the court, but that the claim of an allowance for the services enumerated in it was the same thing as a claim for compensation for those services was and is entirely clear to any ordinarily intelligent comprehension. So grave a reflection, without any just, reasonable or even fairly colorable foundation for it in the record, against a lawyer of long and unimpeached standing at the bar of this jurisdiction, would seem to be accountable only on the theory that the personal hostility of one of the appellants has unfortunately been allowed to filter its way into the brief, and this for the first time in the court of last resort, without any allegation in the pleadings or otherwise in the record to give notice of it to the party attacked, or opportunity adequately to reply to it. "No charge of malfeasance or misfeasance is made against the trustees"—auditor's report (Rec., p. 42). "A number of exceptions were entered to said report. Those that have been relied on relate to the allowance of the 5 per cent commission on principal and 10 per cent on income; to the $18,800 item allowed by the Massachusetts court, and to alleged profits made by the trustees in the purchase of notes for reinvestment" (Opinion Court of Appeals, Rec., p. 158).

(h) The eighth charge of malfeasance, also, relates to Mr. Maddox alone, and is to the effect that reliance by him on the advice of Mr. Weir, a Massachusetts lawyer, with respect to the proper form in that State of executors' accounts and the claim for an allowance to executors, increased his responsibility because of the fact that Mr. Weir represented the executors, and himself received $1,000 as a fee (Brief, p. 104).

Mr. Weir was of counsel for the executors in the matter, only, of the tax title suit (Rec., p. 59). Mr. Moody, their

senior counsel in that matter, was advising the executors to close their account in Massachusetts before the first of May in order to avoid the possibility of another year's tax assessment (75), for which there was scant margin of time, and for this purpose his associate in the tax suit, Mr. Weir, came to Washington on Sunday, two days before the submission and approval of the account, which was on April 25th, only five days before a new tax year would begin, to assist in the preparation of the executors' account, in time (Rec., p. 59). He was the only one at the Washington conference who possessed the necessary knowledge to suggest the item in the account under the Massachusetts practice for the allowance to the executors for expenses and compensation (59-60), and Mr. Drury supposed the item was arrived at in the account from Mr. Weir's knowledge of the Massachusetts law (60), being aware, also, that Mr. Richardson would know of the item when the account was passed (*ib.*). The charge that it was maladministration upon the part of Mr. Maddox to rely upon the advice given by this Massachusetts lawyer, in regard to Massachusetts law and practice, because he knew the lawyer was to be compensated for his services, if correct, would make it wrongful for clients to rely upon the advice of counsel in any case except when rendered gratuitously. Mr. Weir explained that the $18,800 was to be an allowance to the executors for their work and to pay the costs attending the tax suit, Mr. Maddox knowing nothing of the course of procedure in the Massachusetts courts and making no suggestions (Rec., p. 75).

At pages 32 and 81 of the brief for appellants, it is represented that $1,000 was sent to Mr. Richardson, which he refused to receive and which he turned over to Mr. Weir; that this $1,000 was proffered to Mr. Richardson as "the inactive one" of the trustees, "and, though he refused

it himself, did not see that it was restored to the beneficiaries." On the contrary, the uncontradicted, undisputed testimony in the case is that this one thousand dollars was sent to Mr. Richardson, who was refusing to accept any part of the compensation allowed for work done exclusively by Mr. Drury (Rec., p. 60); that Mr. Weir came to Washington to assist in preparing the executors' account as the representative of Mr. Richardson (Rec., p. 75), and that the thousand dollars, instead of being proffered to and refused by Mr. Richardson, the inactive trustee, was sent him for the purpose of being given to Mr. Weir in compensation for his services, to which purpose in so far as the record shows it was applied (Rec., pp. 60, 97).

(i) The ninth alleged act of maladministration, this time confined to Mr. Drury, is, that he made no report, to any court, of his transactions by way of purchase, management and sale of real estate between the death of the testator and April, 1899 (Appellants' Brief, p. 104), the date when the executors' account was presented to and approved by the Probate Court of Massachusetts. On the contrary, the Auditor's Exhibit 3 (Rec., pp. 96, 118-128), sets forth a detailed statement of every real estate transaction by either the executors or the trustees, these transactions consisting for the most part in buying in, for the protection of the estate, properties on which the testator at his death held second encumbrances, and later reselling such of the properties as do not remain a part of the trust estate, in every instance of such sale with some realization in price to the benefit of the estate. The only property purchased by the trustees otherwise than under foreclosure proceedings upon the second trust notes was the purchase, in 1901, of what is known as the Araby Farm, under the authority of the court as a summer home for the appellants, for the sum of $15,500 (Rec., p. 24).

(j) The next charge of maladministration, made against Mr. Maddox alone, is that he, as counsel for the infant beneficiaries, was content merely to obtain control over the estate by transfer of its administration here and his own appointment as trustee, whereupon all adversary interest vanished (Appellants' Brief, p. 104), which infidelity in the inception of the trusteeship, the brief further states, is wholly inconsistent with the claim of the trustees for compensation (*ib.*, p. 106).

The object of the equity suit, the only one in which Mr. Maddox was counsel for the infant beneficiaries, was to protect the estate from the payment of the Massachusetts taxes (Rec., p. 76), to which end, only, it was necessary to secure transfer of administration to the District of Columbia. Not only is this an undisputed fact in the record, but in the opposing brief, at page 7, the equity suit, the benefit of which the appellants have at no time and in no respect sought to relinquish, is referred to as a "contrivance of the trustees before their appointment to deny and defeat the jurisdiction of the Massachusetts court."

The only "adversary interest" which ever existed in that suit was the refusal of Mr. George F. Richardson to join in the defense against the tax assessment, which, in view of the inability of the Equity Court to obtain jurisdiction over Mr. Richardson, was obviated by the amendment of the bill, making Mr. Drury the sole defendant (76-7). So far from any other "adversary interest" having "vanished," as alleged, the purpose of the equity suit was pursued and accomplished by the transfer of the assets of the estate from Massachusetts to the District of Columbia five days before the beginning of the third taxing year in that State, so that, however the suit there pending to defeat the assessments should be determined, the estate was protected from any further liability to the taxation sought to be enforced

against it. Later, by the decision of the Supreme Judicial Court of Massachusetts in Dallinger vs. Richardson, 176 Mass., 77, the liability of the estate for the first two years' taxes was defeated, which decision, as stated at page 6 of appellants' brief, "put an end to any real apprehension that the estate of Mr. Richardson could be assessed for taxes in Massachusetts, and removed that objection to the continued administration of the estate in Massachusetts, if that had been desired"; but the decision in Dallinger vs. Richardson was not rendered until the 16th day of May, 1900, at which date the Massachusetts administration had been for more than a year terminated, trustees here had been appointed by the Equity Court, and the estate delivered from the possibility of taxation in Massachusetts, these results being accomplished prior to the decision in Dallinger vs. Richardson and when, therefore, it was unascertained whether the defense in Massachusetts against that taxation would be successful. What "infidelity in the inception of the trusteeship" the appellants have felt themselves justified in charging, under these facts and circumstances, made for the first time in their brief in this court, has not thus far been made apparent to the appellees, who are accordingly without opportunity further to reply to it.

(k) The final charge of maladministration, appearing at page 105 of the brief, is that the trustees "were content to receive from Mr. Drury as executor about $100,000 less than the reported assets of the estate. Of this diminution $14,600 were paid to Mr. Drury."

The $14,600 here referred to is, simply, what was left of the allowance to the executors made by the Massachusetts court as compensation for their services and for payment of the costs and expenses of the Massachusetts tax litigation, after payment of those costs and expenses had

been made, and need not be further discussed. With it eliminated, there remains, simply, a charge of maladministration consisting in acquiescence by the trustees in an alleged diminution of the estate by the executors to the extent of about $100,000, with an innuendo or implication, for without it there would be no maladministration, that the diminution in question was a wrongful one. At page 40 of the brief it is alleged that, while the first account of the trustees showed as assets $248,569.01 of good promissory notes in addition to $26,907.06 considered as desperate, their last account showed notes amounting to only $138,642.00, accompanied by a diminution in value of the entire estate during the same period. Again, at page 46, it is alleged that "the value of the *entire* estate, real and personal"—conceded to be $261,201.71—"(less the cash retained), at the close of the trusteeship was less than the amount of the *personal* estate at the beginning of the trusteeship by about $10,000, leaving out of consideration the value of the real estate," with the suggestion that the amount of this loss "seems the equivalent of 14 pieces of real estate turned over to the trustees, but which seem to have disappeared before the estate was transferred to the beneficiaries"; while at pages 50-51 it is charged that the inventory of the estate, verified by Mr. Drury at the commencement of the executorship, showed property valued at $328,124.57 of good assets and $38,-614.78 of bad or doubtful notes, and that the schedule of real estate, including a part of the Eliza C. Magruder trust property, showed a value of $39,800, making the total value of the property inventoried $406,139.45—this schedule not containing, it is further objected, the lots in Cambridge mentioned in the bill of complaint and the answer of Mr. Drury, of the disposition of which lots, it is further complained, there is no account anywhere in the record.

With respect to the Cambridge lots, the very objection shows that they were not accounted for in the Massachusetts proceedings or in any one of the four accountings had before the auditor of the Supreme Court of the District of Columbia prior to the final audit here in controversy, and that, therefore, the appellants were fully privileged, if they or their counsel were really ignorant of the true facts in regard to those lots, to call upon the appellees in this sixth or final accounting, out of which the present appeal arises, for the accounting as to those lots, the absence of which they now complain of. It is manifest from the auditor's sixth report (Rec., pp. 37-47) and from the opinion of the Court of Appeals (Rec., pp. 147-165) that these lots formed no part of any of the contentions between the parties, which fact is further emphasized by the appellants' exceptions to the auditor's report (Rec., pp. 129-131), no one of which bears the remotest reference to them; and this although, as the appellants and their counsel well knew, the order of reference under which the sixth audit was had was, "to state the final account of the trustees and distribution of the trust estate in their hands" (Rec., p. 37). An objection under these circumstances, first made in the court of last resort, presenting a question neither raised below nor capable of being raised under the exceptions, must under familiar principles be untenable here.

Why the appellees, when examined on behalf of the appellants before the auditor, were not interrogated as to these Cambridge lots is, however, apparent. The testator's will (Rec., pp. 9-10), describes himself as "a citizen and inhabitant of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, and having property in said county," from which recital it is perhaps to be presumed that he was the owner of some property in Middlesex County at the time of the execution of the will. Both the

bill and the amended bill of the appellants accordingly (Rec., pp. 3, 7) allege that the testator at the time of his death had "one or two parcels of unproductive real estate of trivial value, and no other property," subject to the jurisdiction of the courts of Massachusetts. The schedule of real estate returned by the executors to the Massachusetts court, however (Rec., p. 85), includes no property in Massachusetts; their petition to the Massachusetts Probate Court (Rec., p. 86) recites that neither at the time of the granting of the letters testamentary to them nor since had there been any property in Massachusetts belonging to the estate of the testator, and in the tax suit, Dallinger vs. Richardson, 176 Mass., 177, 179, the courts of Massachusetts found the fact to be that the testator had had no property in Cambridge since the year 1875. That this situation with respect to the Cambridge lots was fully known to the petitioners is further evidenced by the fact that, in their petition to the Supreme Court of the District of Columbia, filed June 16, 1909, asking distribution, etc., they filed as Exhibit "D" a statement of all the assets of the estate (Rec., pp. 32-33), both real and personal, which includes no claim of any property in Cambridge or elsewhere in Massachusetts.

It remains to consider, therefore, only the charge that the trustees have acquiesced in an alleged diminution in the estate by the executors, to the extent of about $100,000, and that, while their first account as trustees showed $248,569.01 of good promissory notes, their last account showed notes amounting to only $138,642, accompanied by a diminution in value of the entire estate.

Schedule A of the executors' account in the Massachusetts Probate Court shows, it is true, total assets of $415,458.37 (Rec., p. 89), while the eight items receipted for by the trustees, as the amount of the trust estate turned over

to them (Rec., pp. 90-91), foot up $300,031.71, a difference of $115,426.66. The acceptance by the trustees from the executors of this $300,031.71 as the net trust fund, instead of the $415,458.37 with which the executors charged themselves, constitutes the alleged diminution of about $100,000 in which the trustees are charged as acquiescing. Upon examination of Schedule A before the Massachusetts Probate Court, however (Rec., p. 89), it will be found that, included in the $415,458.37 with which the trustees charge themselves, are $37,593.77 of income or interest on notes, $1,005 dividends collected, and $7,218.96 of receipts from real estate, all collected since the testator's death and forming no part of the corpus or principal of his estate; while Schedule B (90) shows that, of the alleged diminution of about $100,000, $17,400 was paid to the testator's daughter for her support as provided by the will, $8,200 was paid to the guardian of the children, for their support after their mother's death; $49,705.31 were moneys expended in repairs, taxes and prior mortgages upon the real estate, one of these mortgages, for $15,000, being an encumbrance existing upon the homestead of th testator himself, at the time of his death; that $6,731.64 were moneys paid for various trust estates held by the testator, and that $18,800 was the allowance made by the Massachusetts Probate Court to the executors as compensation for the costs and expenses of the tax litigation and for their services as executors, together with sundry smaller sums, also properly and necessarily to be deducted from the total amount of assets received by and charged against themselves in Exhibit A.

Page 40 of the brief, as above stated, charges that, while the first account of the trustees showed as assets $248,569.01 of good promissory notes, their last account showed notes amounting to only $138,642. As shown at page 98 of the record, the schedule referred to at page 40 of the

brief as showing assets of $248,569.01 of good promissory notes was prepared by the principal account clerk in the office of the Register of Wills in the District of Columbia, who assumed that the account of the trustees should begin with the date of their appointment, April 1, 1899, and prepared that schedule accordingly; with the result that the trustees were charged with the funds in the hands of the executors as of that date, which included the $18,800 allowed them April 25th by the Massachusetts Probate Court, no part of which sum ever came into the hands of the trustees, having been paid to the extent of $5,800 out of the cash in the hands of the executors, and to the extent of the remaining $13,000 by notes in their hands, included in the $248,569.01 of notes shown in Schedule A of the first auditor's report (Rec., p. 22); this error being corrected, in Schedule A of the first auditor's report (Rec., p. 22), by crediting the trustees with the $18,800, as though the same had been paid by them. These facts were fully developed in the testimony before the auditor in connection with the sixth and final accounting.

With respect to the alleged diminution of the estate during its administration by the trustees, the auditor finds that, when delivered to the beneficiaries, it consisted of real estate and first trust notes well secured, in contradistinction to the negligible character of the estate when it was received by the trustees (*i. e.*, consisting largely of second trust notes), and that it was little less in amount than the estate originally received by them although it had supplied the beneficiaries with an income of $8,400 per annum during the period of the trust—in addition to the use, rent free, of the homestead, valued at $35,000, as a winter home, and of Araby Farm, which cost $15,500 more, as their residence in summer.

Of the eight items constituting the trust fund received

by the trustees from the executors (Rec., pp. 90-91), the first seven comprise cash, household furniture, stocks, etc., with regard to which no question has been raised. The last item consisted of "notes, secured and unsecured, of $279,839.40" face value, of which notes $26,907.96 were desperate and $21,876.82 were worthless (Schedule A, Rec., p. 99), these notes being itemized in Schedules Bb and Bbb, at pages 104 and 105 of the record, making the amount of promissory notes for which the trustees were liable $231,054.62. The attitude of the appellants toward these worthless notes in the audit and the disposition made of them, is shown in the record at pp. 77, 79, 83.

Of the said $231,054.62 of promissory notes received from the executors by the trustees for which they are liable, every one is carefully traced and accounted for in the several accountings before the auditor; all were collected, both principal and interest, except seven, namely, the notes of Groff, McLeran, Stein, Crowley, Herr and Thompson, aggregating $12,832, which were delivered to the beneficiaries in obedience to the decree of July 9, 1909 (Rec., p. 33). It is impossible, therefore, to claim justly, or colorably, that there has been any diminution on note account, for which the trustees are accountable.

On page 72 of the brief for appellants it is stated that the trustees have not accounted for $39,800 of realty, returned in the executors' inventory to the probate court at Cambridge. The parcels so returned were eight in number, of which three, namely, 1121 15th Street, 441 Franklin Street and the property in St. Louis, Mo., of the value of $12,300, though standing in the name of the testator, belonged to the Eliza C. Magruder trust, and have been accounted for accordingly (Rec., p. 25). This left four parcels, enumerated in the inventory (Rec., p. 85), all of which are duly accounted for in the record except "Interest in 10 acres of

land at Colorado, $250," which item, like the Cambridge lots, was never discovered, it must be assumed to the knowledge of the appellants since neither they nor their counsel called for any accounting in respect to them in the sixth and final accounting before the auditor, in which they participated, filed no exception to their omission from the accounting, and made no reference to them in their own division of the assets of the estate which appears at pages 32-33 of the record.

The statement at page 46 of the brief that, in the division, there was delivered to the beneficiaries "personalty valued at $142,811.73," omits the shares of the Missouri Railroad Company and of the Bigelow Carpet Company, delivered at that time and valued for purposes of division at $9,373 (Magruder Exhibit D, Rec., pp. 32-33).

With respect to the administration of the real estate by the trustees, only one voluntary purchase, the Araby Farm, was made by them, by the court's direction as above stated, as a summer home for the appellants. A number of pieces of real estate were bought in by the trustees at foreclosure sales in the effort to collect second trust notes held by the testator at the time of his death, the history of the acquisition of these properties, and the disposition of so many of them as were subsequently sold by the trustees, being set out particularly at pages 118-126 of the record, showing the encumbrances, both first and second, which existed upon each of the parcels, the amounts paid in sundry instances to acquire the first trusts in order to protect the second, and the amounts received for such of the parcels as were subsequently sold, these sales in each instance realizing more than their cost to the estate. Fifteen parcels were so sold, supposedly referred to at page 46 of the brief as "14 pieces of real estate which were turned over to the trustees, but seem to have disappeared before the estate was transferred

to the beneficiaries," each of these fifteen parcels having realized more than its cost to the estate as above noted, and as will appear from the detailed report, pages 118-126 of the record.

The aggregate amount paid by the trustees in satisfaction of first encumbrances existing against real estate acquired under these foreclosure proceedings, and including a $15,000 mortgage left on the testator's homestead at his death, is $139,989.19 (Rec., p. 128). After applying to this aggregate the proceeds of real estate sold, amounting to $58,074.84, there remains a balance of $81,915.05, to be made up to the trustees, out of the proceeds of notes collected. We have the following result:

Notes turned over to the beneficiaries, allotments A and B (Rec., pp. 32-33)	$126,938.73
Notes to be held jointly (Rec., p. 33)	14,222.00
Expended in the purchase of Araby	15,500.00
Paid on account of mortgage notes	81,915.65
Total notes accounted for	$238,576.38

an increase of $7,522.74 over the $231,054.64 of notes secured and unsecured (Rec., p. 90) received by the trustees from the executors, after deducting the $48,784.76 desperate and worthless notes charged off in the first accounting before the auditor, shown at page 116 of the record.

In short, after paying for the beneficiaries an average of $8,400 a year in their support, besides maintaining for them, free of rent, taxes, repairs and insurance, a city residence valued at $35,000 and a summer residence which cost $15,500, the trust estate has been increased, instead of diminished, to the extent of nearly $8,000.

The foregoing consideration of the charges of maladministration under which it is attempted to be

urged, in this court for the first time, under the first exception to the auditor's report, that there was error in the allowance of any compensation made to the trustees, has embraced to a considerable extent discussion of the questions raised by the remaining exceptions, which may therefore be more briefly disposed of.

II.

The second exception to the auditor's report, as summarized above, is to the allowance of the commission upon the principal estate *received* by the trustees, instead of upon its net amount as delivered by them to the beneficiaries (Exceptions II, III). This exception is open to the two objections already pointed out and considered at pp. 12-13, *supra*.

III.

The third exception is to the failure or refusal of the auditor to consider, for the purpose of determining the compensation to which the trustees were entitled, the fact that Mr. Drury realized, under an allowance of the Massachusetts courts as the compensation of the executors for the two and a half years that they acted in that capacity, $14,600, which would be at the rate of about 3½ per centum upon the personal estate which passed through the hands of the executors—five per centum being the minimum amount which could have been allowed under the laws of the District of Columbia at that time had the probate and administration taken place in the District, where the domicile was ultimately ascertained to be. Abert's Compilation, p. 29, Sec. 125.

Suppose A and B had been named as executors, and B and C as trustees, under the will; what bearing would the

compensation received by the executors have had upon the commissions or compensation of the trustees? The compensation, in each case, covered a different period of time, and separate and distinct services.

So separate and distinct are the position and duties of executors and trustees, though created by the same will and reposed in the same persons, that, after the passing of the final account of the former, the assets are, as a matter of law, held by them in their latter capacity, for which they are not accountable in their former one, nor are their sureties as executors liable therefor. Seegar vs. State, 6 H. & J., 165-6; Connor vs. Ogle, 4 Md. Ch., 425, 448-9; State vs. Cheston, 51 Md., 377; United States Trust Co. vs. National Savings and Trust Co., 37 App. D. C., 285, 299.

Commissions or compensation paid A as executor have no bearing upon the question of his compensation or commissions as trustee. Whitney vs. Everard, 42 N. J. Eq., 640, 367-8.

IV.

The fourth exception is to the auditor's refusal to charge the trustees, or the trustee Drury, with the alleged profits made by the firm of Arms & Drury, of which the trustee Drury was a member, in connection with certain real estate mortgages which the trustees purchased from Arms & Drury as investments of the trust funds (Exceptions VI, VII, VIII and IX). These profits, which it was contended before the auditor in the lower courts should be simply considered in determining the amount to be allowed the trustees for their commissions, are urged here as constituting maladministration by them, for which all compensation should be denied; which contention has been discussed at pages 15-20 of this brief.

Exception IX (Rec., p. 130) is to a finding by the auditor that commissions paid by the trustees to Arms & Drury for

the collection of rents, or for the placing of insurance, etc., do not affect the question of compensation justly due to the trustees from the estate. With respect to the rents, inasmuch as all claim to any allowances for commissions to agents for the collection of rents was voluntarily withdrawn by the trustees (Rec., p. 40), and no items of this character were charged against the beneficiaries, so much of the exception as relates to them is doubtless attributable to inadvertence on the part of the exceptants.

The matter of the insurance commissions is almost too small to justify discussion. Its amount, less than $100 (Rec., p. 78) and under the circumstances of the case, might well fall under the maxim *De minimis non curat lex*, even if the objection were otherwise tenable—especially in view of the fact, shown by the auditor's report, that the trustees have not asked any allowance upon the value of the household effects, the carriages, etc., or on the value of the real estate owned by the testator at the time of his death though requiring their care and attention during all these years, nor for their services in connection with the payment of taxes, insurance charges, repairs or the like upon any of that property. The objection is apparently abandoned, not being urged in the Court of Appeals nor in the brief for appellants here.

V.

The fifth exception is to the refusal of the auditor to allow commissions or compensation to Alexander R. Magruder as one of the trustees under the will. As above pointed out, in his petition to the court for distribution to him of his share of the estate at this time, he states, in terms (Rec., p. 29), that he has had no active participation in the management of the assets of the estate, nor in the execution of the trusts. What, then, can be the basis of his claim that he should be allowed commissions? Is it

that a part of the compensation justly to be allowed to Maddox and Drury for their services should be taken from them and given to him, who rendered none? Or is it that, over and above the just compensation due to them for their services, something should be taken from the shares of himself and of his sister and given as compensation to him for services, when he admits none have been rendered by him?

The rule is settled, without exception or dissent in any of the authorities it is believed, that, as between trustees, the compensation for the total service performed should be apportioned among them according to their respective shares in the performance of them (Dunn vs. R. R. Co., 32 Fed., 185; Higgens vs. Rider, 77 Ill., 363).

Still in addition, the will in the case at bar expressly provides: "I desire that my executors shall be paid, each for the actual services rendered by himself only, and that they shall not be responsible for each other's acts."

At page 23 of the brief for appellants, it is claimed that the action of Mr. Maddox in suggesting to Alexander R. Magruder the propriety of conveying to his father for life his interest in the Araby Farm, considered, *supra*, pp. 29-30, "made co-operation betwen the three trustees impossible and the relations between the trustees and their *cestuis que trust* hostile, and the beneficiaries patiently waited for the time to arrive when the trust could be determined under the provisions of the will." This claim rests only upon that exceedingly flexible foundation, such allegations as parties may choose to put forward in a brief, no particle of evidence in this respect being given by Mr. Magruder or by any witness in the case. The record, on which alone parties first attacked in the appellate court must rely for their defense, and to which alone the court will look for the facts, shows, without the possibility of dispute or

controversy (pp. 81-83), that Mr. Maddox filed the petition for Alexander R. Magruder's appointment upon his attaining his majority, pursuant to the provision of the will in regard to his being made a trustee, and procured an order appointing him trustee accordingly; that Mr. Maddox tried to interest him in the matters pertaining to the estate, and suggested to him to come to the District of Columbia and familiarize himself with the management of the real estate, and of the real estate loans of which the estate mainly consisted, but that he declined or neglected to do so, at first went into some business in New York, then removed to Lowell, Mass., persistently remained away from the District, never offered to do anything, or inquired whether there was anything he could do.

VI.

The sixth exception to the report of the auditor is to an alleged inconsistency upon his part in holding that he was without authority to open up or reform the account of the trustees as stated in the first report of the preceding auditor, although indicating that a tacit understanding had been arrived at by counsel that the account should be reopened, followed by an actual opening and re-examination of it by him.

This exception having been discussed at length in connection with the fifth charge (e) of maladministration, at pp. 30-36, *supra*, we will not protract this brief beyond a brief statement at this point of the facts in regard to the auditor's action concerning this prior report.

The re-opening which it is claimed the auditor should have made was for the purpose of stating the account of the Massachusetts executors, on the ground that the auditor's first report did not comply with the order of reference under which it was made, in that it failed to

state the accounts of the executors. This re-opening the auditor held he was without authority to make under the orders of reference under which he was acting, even if the court below was vested with jurisdiction to vacate the decree of the Massachusetts court allowing those accounts, or to require the executor, commissioned by that court to re-state their accounts in this jurisdiction. The allowance of the executors' accounts was by the Massachusetts Probate Court, which allowance, as already shown by the authorities, could not be attacked collaterally in equity, even in Massachusetts (*supra*, p. 36).

The tacit understanding, referred to in exception XII to the action of the auditor thereunder, as will appear from the report (Rec., pp. 38-9), related only to an apparent double credit for the payment of the $18,800, once in the executors' accounts in Massachusetts (Rec., p. 90), and again in the auditor's first report (Rec., p. 24), explained by the fact that the accountant who prepared the first account of the trustees began with April 1, 1899, the date of their appointment, and charged them with the $18,800 then in the hands of the executors, instead of commencing with April 25, 1899, the date when they received the trust assets from the executors correcting the result by crediting them with the $18,800 as though paid by them to the executors (Rec., pp. 98, 38-9). While allowing this error and its explanation to be gone into under the "tacit understanding" referred to, the auditor refused to reopen the account itself, under the tacit understanding or otherwise for the reasons set forth in his report, at page 39 of the record, and considered at pages 32-6 of this brief.

VII.

The objection to the auditor's report set forth in Exception XIII (Rec., p. 131), that the appellants were en-

titled under the order of reference and the proceedings before the auditor to an accounting in the District of Columbia Equity Court with respect to the entire estate of the testator, including the property and estate received by the executors, has already been fully considered.

VIII.

The final exception, No. XIV, to charging the auditor's fee against the cash in the hands of the trustees, can not require discussion, and seems not to be pressed in this court.

The Eliza C. Magruder Trust.

The eighth assignment of error, appearing at p. 58 of appellants' brief among other objections already discussed, claims that it was error to discharge the appellees from their office as trustees under their appointment by the court, while at the same time they are retained, with Alexander R. Magruder, as trustees in respect to the Eliza C. Magruder trust.

The declaration of this trust, appearing at pp. 21-22 of the record, shows that, before either the testator'sdeath or the execution of his will, appellants' father with certain other persons conveyed to him the property therein described, in trust for Eliza C. Magruder for life, with remainder to the appellants, the declaration of trust providing that, upon the testator's decease, the trusts should be executed by his executor or executors or whoever should settle his estate. This trust is not referred to in the will, in the Massachusetts proceedings, nor in the decree of April 1, 1899, appointing Drury and Maddox trustees to administer the trusts, " created in and by the said will." It appears, however, that they assumed the management of this trust, embracing their administration of it in the first

and each of their successive accountings before the auditor, including their sixth and final account as trustees under the will (Rec., p. 112)—the appellant Alexander R. Magruder, however, taking no more part in the administration of that trust than in those created by the will. In the final decree of the Equity Court (Rec., p. 132), which overruled the appellants' exceptions to the auditor's report and directed distribution in accordance therewith, it is added that, "upon their filing in this cause their vouchers, showing such distribution by them, the said Samuel A. Drury and Samuel Maddox be, and they hereby are, discharged of and from their said office as trustees *under their said appointment by the court in this cause*," which appointment as above noted was without any reference to the Eliza C. Magruder trust. In the Court of Appeals, appellants, nevertheless, argued that this provision of the decree of the Equity Court was erroneous, in that it discharged the appellees also, as trustees of the Eliza C. Magruder trust, with respect to which objection the Court of Appeals said (Rec., pp. 164-5): "It is evident that the court in entering the decree did not intend then and there to terminate the administration of that trust, but the form of the decree may be objectionable as warranting the construction given it by the appellants. The case has not been finally closed in the Equity Court, and its power to correct the decree in that respect is fully recognized. * * * So far as the Eliza C. Magruder trust is concerned, the cause will be remanded with leave and direction to the court to amend the decree in so far as it may relate thereto, and take such final action regarding that trust estate as may be expedient and proper."

Inasmuch as the final decree of the Equity Court (Rec., p. 132) discharged the appellees only "of and from their said office of trustees under their said appointment by the

court in this cause," and since the order appointing them trustees in this cause was, only, "to perform the trusts created in and by said will" (Rec., pp. 16-17), it would seem that the objection of the appellants in the Court of Appeals now under consideration was without merit; but in any event the equity decree as modified by the Court of Appeals leaves nothing to which even strained objection can be taken.

At p. 51 of the brief for appellants it is stated by way of objection to the compensation of the trustees that their services were of the usual and commonplace kind, "obviously well within the competency of any real estate broker and real estate agent of average ability, skill and experience." The character of the services required and rendered are summarized by the auditor at pp. 45-6 of the record, as to the accuracy of which summarization there is no ground for dispute or controversy in the record. And see opinion of the Court of Appeals, Rec., pp. 158-9. At p. 55 of the brief for appellants, the trustees are charged with "refusal to account for the early period of their trusteeship," the only foundation for which imputation is the refusal, not of the trustees, or of either of them, but of the auditor, sustained by both the lower courts, to re-open the accounts, not of the trustees, but of the executors, duly rendered to and passed by the Massachusetts Probate Court, and in the absence of any suggestion in the pleadings of attack upon that account, even if the subject of collateral attack in the District of Columbia.

Also at p. 55 of the brief, Mr. Maddox is charged with having attempted "to destroy a part of the trust," the foundation for which charge is, only, his suggestion to Alexander R. Magruder of the propriety of conveying his interest in Araby Farm to his father for life, in view of the fact that the father, in sickness and the apprehension

of death, had conveyed his inheritance to the testator in trust for the appellants.

It is respectfully submitted that there is no error in the decree below, and that it should be affirmed.

J. J. DARLINGTON,
Solicitor for Appellees.